HUGO GROTIIUS
Regiae Regni Sueciae Consiliarius
eo tempore ad Regem Christianissimum Legatus
quondam Syndicus Roterodami
eiusdem Urbi in Conventu Ordinum
Hollandiae et Westfrisiae
Delegatus.
The Most Excell.
HUGO GROTIUS
OF
the rights of
Peace & Warr
Translated into
English by the
Reverend
William Evans B.D:

Printed for Ralph Smith under the Piazzza of ye Royall Exch: in Cornhill.

T. Crook Senior Printers
THE MOST EXCELLENT
HUGO GROTIIUS
HIS THREE
BOOKS
Treating of the
RIGHTS
OF
WAR & PEACE.

In the First is handled,
Whether any War be Just.

In the Second is shewed,
The Causes of War, both Just and Unjust.

In the Third is declared,
What in War is Lawful; that is,
Unpunishable.

With the ANNOTATIONS digested into the
Body of every Chapter.

Translated into ENGLISH by
WILLIAM EVATS, B.D.

LONDON,
Printed by M. W. for Thomas Basset at the George in Fleetstreet, and
Ralph Smith at the Bible under the Piazza of the Royal Exchange
in Cornhill. M DC LXXXII.
THE

EPISTLE

TO THE

READER.

The Author of this Translation was by Profession a Divine, Eminent for Learning, and well skill'd in the Civil Laws. He was a great Admirer of the Works of Hugo Grotius, and valued him particularly upon this Treatise of the Rights of War and Peace; wherein finding matter fit for a general communication, he thought it well worth his time to Translate. It was the Labour, or rather Pastime of the last Seven Years of his Life to perfect it; which he intended to Print during his Life: And so we found it in his Study after his death. And although it added nothing to the value of his Estate; yet we (to whom he committed the care of all the rest) thought it our duty to make this Publick, believing it would
To the Reader.

would prove a more durable Monument to preserve his Memory, than any other we could raise unto him.

'Whilest it was in the Original, it was a Jewel, but hid from Vulgar Capacities; it is no less a Jewel now it is made intelligible to every Capacity.

We shall not enlarge this Epistle in Praise either of the Work or the Author, the Translation being sufficient for both, if thou wilt take the pains to Read it.

John Nelham.

Nov. 1681.

Thomas Whitfield.
THE PREFACE.

THE Civil Law, whether that, proper to the Romans, or that appertaining to any other people, many have endeavoured either to expound by large Commentaries, or to expose to present view by Epitomes: But of that Law, which governs most Nations, and the Rulers of diverse People, whether it arise from Nature, or be instituted by Divine Authority, or whether it be introduced by Custome or Tacite Consent, few have hitherto treated; and none at all either Universally or Methodically: though such a Treatise would highly conduce to the Benefit of Mankind. The Excellency of this Science, saith Seneca, is seen in Leagues, Covenants, Articles of Agreement, and Conditions made between diverse free people, and between Kings of Foreign Nations, and in all the Rights of War and Peace. Infomuch, that Euripides prefers it before all other knowledge of things either Divine or Humane; saying,

It's vain, of Things, of Gods, or Men, to boast,
Past or to come: unless what's Jus't thou know'lt.

And indeed, such a Treatise would be so much the more necessary, by how much we find many as well in this, as in former Ages, contempting this part of justice, as if there were nothing in it but an Empty Name. There is nothing more frequent in every man's mouth, than that of Euphemus in Thucydides, To Kings and Cities Imperial, there is nothing Unjust, that is Profitable. And that also which the Athenians (being then the most Potent Party in all Greece) told the Metians, To humane reason, those things are Just, which an Equal Necessity on both sides impoeth: otherwise, whatsoever the stronger Party can and will do, the weaker Party must suffer. As if it were in the power of Fortune to make Oppression just; or, that no Common-wealth could be well govern'd without Injustice. Whereunto they
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they usually add, That the Sword is the Common Judge or Arbiter of all differences arising between Kings and Foreign Nations. Neither is this the opinion of the Vulgar only, That all Laws are silenced by War; but some such like sayings do often fall from Men otherwise Learned and Prudent, whereby this Opinion gathers strength. There being nothing more frequently opposed one to another, than Law and Arms: Thus we find them opposed in Enneus,

—to gain their Right,
Not at the Law, but with their Arms, they fight.

The like we find in Horace, who speaking of Achilles, faith,

Nothing by Law, but All, by Arms, he claims.

Old Antigonus taught at him, who beholding him busied in battering the Forts and Cities of his Enemy, presented him with some Commentaries of Justice. Marius was wont to say, That he could not hear the Cry of the Laws, for the Clashing of Arms. Lyfander in Plutarch, laying his hand upon his Sword said, He that knows how to use This, is the best Judge of the Bounds of Empires. To the same purpose was that of Cæsar, Non eft Idem tempus Armorum, quod Legum; Arms and Laws do never flourish at one and the same time. Kings, faith Seneca, grant many things blindfold, especially in times of War: for no one man, though Jus, can possibly satisfy the desires of so many Armed Men; neither can any one man at the same time perform the Office of a Good Man, and of a Good General. Nay, even Pompey himself, though otherwise very Modest, yet would say, Armatus ut Leges cogitum? What do ye tell me of Laws, that am I in Arms? Or as Plutarch frames his Answer to the Mamertines, What, will ye never cease to upbraid us with your Laws, whom ye see begirt with Swords? So easily, faith Curtius, doth War pervert and destroy even the very Laws of Nature. Even among Chrisitian Authors, we find many such like sayings: That of Tertullian shall suffice instead of the rest, Dolus, Asperitas, Injufitia, propria sunt Præliorum negotia; Fraud, Cruelty and Oppression are the proper Implications of War. Now they that favour this Opinion, will doubtlesse object against me, that of the Cimanian,

If Things uncertain, thou with certain Rules
Wilt Guide, thou'lt undertake a Task as Bad,
As he that would with Reafon run stark Mad.

Seeing then it would be to no purpose to treat of Right, if there be no such thing; It will very much concern us, to commend and defend this ensuing Discourse, by a brief, but sound Conflagration of this Error.

But
But that we may avoid Confusion in disputing with a Multitude, let us allow them an Advocate; and who fitter than Carneades, who arrived at that height and perfection of Eloquence, that he could plead as strongly for Error, as for Truth: This man having undertaken to decry Justice, especially that part of it which we now defend, could find no Argument more forceable, than this, Men, faith be, have ordained unto themselves Laws for Profits fake, various, according to their several manners, which also they often change with the Times: whereas indeed, there is no Natural Law or Right at all. For all, both Men and other living Creatures, are by the mere Guidance of Nature, led to such things, as to themselves are profitable: Wherefore there is either no Justice at all; or if there be any, it is extream folly, because it robs it self to enrich others. But what the Philosopher here faith, and the Poet after him:

What's Just, or Unjust, Nature can't discern.

must by no means be admitted: For man indeed, is a living body, but far more excellent than all others, and much more differing from the rest, than they do one from another; as may easily be demonstrated by many actions, which are proper only to mankind. Among which, this is one, that he greedily affects Society, that is, Community; yet not any but that which is peaceable, and according to the Model of his Understanding, Regular, with those of his own kind; which the Stoics term siimu, Familiarity. Men, faith Chryfofton, with men have Society naturally; and why not, seeing that Beasts with Beasts have the same. And in another place he tells us, That Nature hath inftill'd into our minds the very seeds of Vertue. This also M. Antoninus (that Emperor who was so highly famed for his Philosophy) thus testifies, That we were born for Communion, was long since apparent: For, Is it not plain, faith be, That Nature frames all things in order, when we fee the worfer things made for the better, and the better things one for another? That therefore which Carneades affirms, That every Creature is by Natural Instinct led to such things, as are to it self only profitable, if univerfally taken, is not to be granted: for some of the rest are content to abate somewhat of their own profit, partly to their young ones, and partly to others of their own kind; The Proverb intimates as much, when it faith, Canis Caninam non eft; One Dog will not eat another. And the Poet confirms it,

Tygers, though fierce, at Peace with Tygers are:
And every Beast will its own Kindred spare.

It was therefore Philo's advice, Let men, faith he, learn Gratitude from Dumb Beasts: The Dog will defend his Masters house that feeds him, and oft-times will expose himself even to death for him, up-

Upon the Fifth Commandment.
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on the approach of any Danger that threatens him. Is it not then the greatest of all shames, that a Dog should be more thankful than a Man? And that a Creature naturally Fierce and Ravenous, should in Gratitude excell the Mildest and Meekest of all Creatures? But if we scorn to learn our duty from Creatures Terrestrial, let us yet observe the Nature of Birds, thoes Aereal Travellers: The Stork being Feeble through Age, and not able to fly abroad, rests in her Nest, whilst her young ones travelling o’re Sea and Land, seek for Food for their aged Parents, who being worn and spent with Age and Travel, deverbely enjoy ease, plenty of necessaries, nay, of delicacies; whereas their young ones comfort themselves with this, That they have conscientiously performed that duty, which Piety exacted from them, together with an expectation of the like to be paid unto them hereafter, when they also shall grow old, and through age, feeble. Thus do they in due time discharge a necessary debt, by restoring that, to their Parents in their old Age, which in their Infancy they received from them. Now from whence think ye, do they learn this duty of fostering their young, but from Nature; being in the same manner fostered themselves when they are young? And how can they hear this, *faith* Philo, and not hide their heads for shame, that take no care of their aged Parents, but wilfully neglect them, whom either alone or before all others they ought to sustain? Especially considering, that in so doing, they cannot be said properly to give, but only to repay what they owe them: For Children have nothing of their own, but what they derive from their Parents, who either gave it them, out of what was theirs, or by some means or other enabled them to get it.

Now in Beasts, this care of their young, proceeds (as I conceive) from some Extrinsic Intelligent Principle, because as to other Acts, not more difficult than these, the same Intelligence doth not appear in them. The like may be said of Infants, in whom, as Plutarch well observes, there is a Natural Propensity to do good unto others, even before they are capable of Instruction, and whom Nature it self teacheth to be Compassionate. But in a man of perfect Age, when knowingly he doth the same in like cases, having withal an exceeding great desire after Society, whereof he alone of all other Creatures hath the proper Organ, I mean, Speech: In him, *If I*y, it is fit that we should admit a Faculty of knowing and doing things according to some General Rules, whereunto whatsoever is agreeable, is not so to all living creatures, but peculiarly to mankind only. Homo ad id natus est, bene ut aliis faciat, &c. Man, *faith* M. Antoninus, was born for this end, to do good unto others. And again, Sooner may we find Bodies Terrestrial not tending to the Earth, than a found and perfect man, not affecting the Society of men. For as he speaks in another place, *Quod ratione utitur necessario Coetum appetit*; *Whatsoever hath the Faculty of Reason, must necessarily affect*
affect Society. *To the same purpose is that also of Nicetas Coniates, Nature her self hath insculpt and ingenerated in us, a mind easily con-
senting and agreeing with thofe of our own kind. Neither can I here
omit that excellent saying of Seneca, That thou maft understand, how
desirable a thing of it felf it is, to have a thankful mind; and how
odious a thing Ingratitude is: Know that there is nothing sooner
difolves and disjoins Humane Society, than this Vice of Unthank-
fulness. For wherein otherwise conflits our security, if not in thofe
mutual good offices, that we do one to another, by which Commerce
and Exchange of Courteffies only, our lives are strongly guarded and
fortified againft all violent Incursions whatsoever. Take us fin-
gly, and what are we but a prey to all other creatures; and as fo
many Sacrifices, to appeafe the hunger or rage of ravenous beafts?
No Blood fo vile, none fo easily purchaled as ours. All other
creatures are sufficiently guarded against all violence. Whatev-
er is born wild and unlociable, comes into the world armed;
only man comes naked and infirm, having neither Hoofs, Horns,
Claws nor Teeth, to make him to appear terrible to the rest; only
two things Nature hath given him, whereby both to offend
others, and to defend himself, namely, Reafon and Society.
By thefe, he that being single, is weakest of all, becomes Lord
and Mafter of all: It is Society that gives him the dominion over
all other creatures; it is Society that transfers Empire from one
Nation to another, extending it felf over the Seas alfo; it is this
that mitigates the violence of Diseafes; it is this that yields Com-
fort to old age; this affwageth grief and pain; this makes us
strong, valiant, nay, invincible: For as much as we may law-
fully crave its affiftance, even againft Fortune her felf. Take
away this, and you break asunder that Unity that there is be-
tween mankind, whereby our lives are futfained: And it is cer-
tainly taken away, if Ingratitude be not in it felf odious. *Thus
for Seneca.

Now this very confevation of Society, as it is agreeable to humane un-
derstanding, though but crudely here exprefl, is the foundation of that which
is properly called Right. From whence arifeth our abftinence from that which
is anthers, and our reftoring of that which we have detained, together
with the full profits we have made of it: As also our obligation to perform
our promises, our satisfaction for damages done unto others through our de-
fault, and the merit of punishment among men. For Justice is by Por-
phyry thus defcribed, Ut abftineretur alienis, neque nocetarum
noscetibus; To abtain from what is anothers, and not to harm
them that are harmles.

From this fignification of the word Right, there flows another of a larger ex-
ent. For feeing that man above all other living bodies, hath not only
such a laudable Faculty as is defcribed, but Judgement also to fcrern, as well

[a] Concerning

the great care

that Doves

have over

their young,

see Porphyry
de rerum natur.

Society the

foundation of

Law.

1. Of Nature

firitely taken.

De rerum natur.

2. Mor t large.

ly.

what
what is pleasant and delightful, as what is hurtful unto itself: And
that not only at present, but for the future, and what may lead unto
either. Is it therefore agreeable most to humane Nature, according to the
measure of humane understanding, to be guided in those things by a judge-
ment rightly informed: I mean, such a judgement, as is not misled, ei-
ther by vain fear, or by the sweetness of some instant pleasure; nor
yet violently carried away by any Inconsiderate Rashness. For what is
manifestly repugnant unto such a judgement is also understood to be con-
trary to the Law of Humane Nature. And hereunto also appertains that
Prudent dispensation in the distribution of such things as properly belong to
every person or Society, which sometimes prefers the wife before the Ignorant,
a neighbour before a stranger, and sometimes the poor before the rich, so
far forth as every mans Acts, and the nature of the thing will bear: Which
many of old reckoned as a part of Right, properly and strictly so called; where-
as notwithstanding that Right, properly so named, may have a far different
nature, namely in this, That those things which are now one mans, may be
permitted to, or accomplished by another.

Now these things which we have already said would hold true, though we
should grant, what without great wickedness we cannot, That there is no
God, or that he takes no care of humane affairs. But since we are in-
structed to the contrary, partly by reason, and partly by perpetual and uni-
versal Tradition, and are therein also confirmed by so many Irrefragable Ar-
guements and miracles, attested by and through all ages: It now follows, That
we ought to obey God in all things without exception, as our Sovereign Lord
and Maker, to whom we owe both our selves, and all we have; especially
since he hath many ways shewed himself to be the best, and most powerful of
all beings. So that he is both most able, and most willing to reward our obe-
dience with the greatest Rewards, even with such as are like unto himself,
Eternal; especially, since he hath confirmed it, and bound himself thereunto
by his Word and Promise; as we Christians being so convinced by Infallible
Testimonies, do strongly believe.

From whence springs up another Law beside that which is Natural, name-
ly, from the Free Will and Pleasure of God, wherein (as our own under-
standings direct us, we must be subject: And therefore we may conclude with
M. Antoninus, Qui injus; et impius est; He that is Unjust is also
Impious. But even that Law of Nature, wherein we have already treat-
ed, Whether it be that which springs from Society, or that which is of a larger
extent, although it flow from principles internal as to man, yet may be defended
be ascribed unto God. Because it was originally his will, that such princi-
ples should be instilled into us. So Chryostome understood it, Cum
Naturam dico, Deum dico, ipse enim Nature Artifex; When I
say Nature, I mean God, who is the Author of Nature. Neither
can we (say Chrysippus and the Stoicks) derive Justice from any
other Root than from Jove himself. From which Word Jove, the
Latin word Justus was very probably at first derived; Unless haply we had
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rather deduce it from Jullum, by cutting off the last Syllable, as of Ollum, anciently is now made Os.

Moreover, God by the express Laws that he hath given us, hath made those very principles yet more conspicuous to them that are of weak understanding, restraining the wandering and otherwise exorbitant passions of those who consult their own, or the safety of others, by curbing those that are most violent with a stronger Rein, and keeping them within his own bounds, both in respect of the manner and of the end. Besides, even the very Sacred History (setting aside what consists in Precepts) doth not a little provoke us to Mutual Love, by teaching us that we are all of us born of the same first Parents. In which sense, what Florentinus faith, is very true, That Nature hath constituted all mankind of one flock or Kindred; whence it follows, That for one man to betray or defraud another, is Impiety. Therefore our Parents are as Gods, even Earthy Gods, as Hierocles calls them, conspicuous and visible Gods, who do imitate the invisible and unbegotten God, in giving life unto others. And therefore Plato calls Parents Gods Images or Representatives. To whom we owe our Reverence as to the Gods themselves, faith Aristotle; yet not such an obedience as is infinite and unlimited.

Again, Seeing that it is a Dictate of the Law of Nature to fulfil all Covenants and Agreements, (for it is necessary that there should be some means of obliging men among themselves, nor can there be any other means found that is Natural;) from this very spring flow all Civil Laws. For they that lifted themselves into any Society, or otherwise subjected themselves to any one man, or to any Society of men: These have also either expressly promised, or from the very nature of the thing itself, ought so to be understood, as if they had tacitly promised to observe and fulfill whatsoever the major part of that Society, or they unto whom their power was transferr'd, had constituted or ordained for the general good. What therefore, not Carneades only, but others also have said,

What's Just and Equal doth from Profit spring,

if spoken properly is not true; For the Law of Nature is the product of Human Nature itself: Which although we should want nothing, yet would, of it itself, carry us to a desir of Human Society. The Civil Law then acknowledged no other Maker, than that very obligation which ariseth from Consent, which because it derives its Authority from the Law of Nature; Therefore may Nature be said to be (as it were Grand-mother to this Law. But even from the very Law of Nature there ariseth some profit: For God who is the Author of Nature, was willing that every man in himself singly considered, should be infirm and defective of many things conducing to a good life, the more briefly to engage us to affect Society. But it was common profit, I grant, that occasioned the Civil Law: For that very Confociation or Subjection (whereof we have spoken) was first instituted for some utility: yea, and they that prescribe

(a) 2

Laws
Laws unto others, either do, or should propose something of profit even there- in. But as the Municipal Laws of every City do mainly regard the benefit of that City, even so among all, or at least the most Cities, there may, may cer- tainly be, some Laws by common consent agreed on, which respect the benefit not of those particular Cities, but of all in general. And this that we call the Law of Nations, so often as we distinguish that Law from the Law of Nature, which in that Partition Carneades made of all Laws into Natural and Civil only, was omitted. Whereas notwithstanding being to treat of that Right which was between Nations (for he subjected his discourse to War and things got by War) he ought most especially to have mentioned this Law. But whereas he traduceth Justice, by calling it folly, he doth ill. For as by his own Confession, That Citizen is no Fool who observes the Civil Laws of the City he lives in, although he (for the reverence he bears unto those Laws) omits some things that would be profitable to himself: So neither is that a foolish people who have not so great an esteem for their own private gain, as for it, to trample upon the Laws Common to all, or to most Nations: There being the same reason for both. For as he that for his present profit, shall violate the Laws of the Country he lives in, doth as much as in him lies, but destroy that, which should perpetually defend both him and his, in whatsoever he hath or shall acquire; so also a people in violating the Laws of Nature and Nati- ons, do but pull down those Bulwarks, that should henceforth secure their own peace and safety. For as M. Antoninus well observes, Whatsoever Action it is, that aims not, either directly or mediatly at the good of the Common-wealth, takes away the life of it, by dislo- ving the connexion of all its parts, and is no less seditious than he that Heads a Party separate from the body of the people: For one man separated from another, cannot but be separated from mankind in general. For, Quod examini expedit idem & Api; As what is good for the Hive, is good for the Bee; so what is profitable to the Common-wealth, is so likewise to every Citizen. So then, Although by our Conformity to the Law, we could expect no profit at all to our selves, yet would it be a point of wisdom rather than folly, to suffer our selves to be carried thither, whether we may perceive our selves to be led by the manufacti- on of Nature. Wherefore neither is that altogether true,

For fear of wrongs, good Laws invented were.

As if men were enforced to be just for fear of punishment only; for this belongs to such Laws and Constiututions, as are found out to be most expedient for the better execution of this Law. As when a multitude of men, finding themselves singly and apart, unable to defend themselves, shall unite and conspire with their common and joint forces, to institute and to defend such Laws and Courts of Jusdictation, as should punish those who should attempt to opprefs them; so that what they cannot do singly, they may be able to do with an united force. And in this fence that may very well be understood, which is usually said, That
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is just which pleaseth the most powerful party. Whereby we may understand, that the Law itself without a power to defend it, lotheth its external force, and so becomes fruitless: which made Solon to boast what gallant things he had done,

By coupling Might, in equal yoke, with Right.

But yet neither is the Law, though it want a force sufficient to abett it, altogether fruitless; because it begets Peace and Tranquility of Conscience: whereas on the contrary, Injustice doth wound and torment it, as Plato instanceth in those of Tyrants. Besides, Justice is approved of and Injustice condemned by the consent of all good men, yea, and what is the greatest comfort of all, This, hath God for its Avenger, That, God for its Patron, who so reserves his judgments after this life, that he oftentimes gives a taste of them, even in this; as we are taught by many examples in Histories. But whereas there are many that think it superfluous, to require that Justice from a free people or their Governors, which they exact daily from private men; the ground of this error is this, Because these men respect nothing in the Law, but the profit that ariseth from it, which in Private Persons, being single and unable to defend themselves, is plain and evident: but for great Cities that seem to have within themselves, all things necessary for their own well-being, it doth not so plainly appear, that they have any need of that virtue (called Justice) which respects Strangers. But not to insist upon what hath been already said, namely, That all Laws were not ordained for Profit only, there is no City so strong and of itself sufficient, but may sometimes stand in need of Foreign Aid, either by way of Commerce or to defend itself, against the united forces of many Foreign Nations, confederate against it: Therefore we see, that the most potent Princes and States, have always been desirous of Leagues, which would be of little use or force were all Laws and Justice confined within the bounds of any one City only.

Most true it is, That as soon as we recede from the Law, there is nothing that we can certainly call ours: If no Community can possibly subsist without Laws (which Aristotle proves by that notable example of Thieves) surely, that which knits together either all mankind, or divers Nations among themselves, had need of some Law to preserve it; which he well knew, who held that a man ought not to do a wicked act, no not for his Country. But some may say (faith Chrysostom) How comes it to pass then that Thieves live in peace? But when I pray tell me, faith he; Surely when they cease to act as Thieves: For when they observe not the Rules of Justice in dividing the spoil, in not giving to every one his equal share, thou shalt quickly fee them engaged in War and Combats among themselves. Plutarch reciting that Saying of King Pyrrhus, That he would leave his Kingdom to that Son who had the sharpest Sword; faith, That it was so said, only to excite them to enrich his House with Blood and Rapine: Whereupon he breaks out into this exclamation, Adeo infociabile
bile, ferinumque est propositum plus suo habendi; So wild and un
faciable a thing is Covetousness. Aristotlce seems exceedingly to blame
then, who though they are not willing to admit of any King, or Governor, over
themselves, but him that hath the true Right; yet regard neither Right nor
Wrong in the Government of Foreigners. The Lacedemonians (faith Plu-
tarch) place the greatest part of Honesty in their Country's profit:
Jus alienum nec norunt, nec discunt, quam unde Spartan putant posse
angeri; They will neither know or learn any other Law, than how
to enlarge their Territories. The like Character do the Athenians give
of them in Thucydides, That among themselves, and to their own
Civil Laws, they were very just; but as to Strangers, they esteemed
every thing honest that was pleasant, and every thing just that was
profitable. But yet when one of the Spartan Kings pronounced that
Common-wealth happy, which was bounded by the Sword and the Spear; Pompey
correcting him, said, Yea rather that Common-wealth is truly happy,
that is on every side bounded with Justice. For which he might also have
produced the Authority of another Spartan King, who preferred Justice even
before Military Promises. Upon this very ground, because all Martial Power
ought to be regulated by Justice, for in case all men were just, there would be
no need of Valour.

Even Fortitude itself is by the Stoicks thus defined, to be Valour contending
for Justice. When Agefileus in Plutarch heard the Persian King fled
Great, He demanded, Quomodo me major, nisi fit & juitor? How is
he greater than my self, unless he be more just? Themistius in his
Oration that he made to the Emperor Valens, elegantly discouraging how Kings
should be qualified, if Wisdom were to chuse them, faith, Not such as should
think themselves entrusted with the care of one single Nation only,
but of all mankind; neither should he profess himself to be a Friend
to the Macedonians only, or to the Romans, but to all Men and all Na-
tions whatsoever. As M. Antoninus sometimes said of himself, Civitas
& Patria mihi eft, ut Antonino, Roma; ut Homini, Mundus: As I am
Antoninus, Rome is my Country; as I am a Man, the World. So also
Porphyry, He that is guided by reason carries himself inoffensively
towards his own Subjects, yea and towards Strangers, yea and to-
wards all men. Quanto ratiune præstans, tanto Divinior; The
more he partakes of Reason, the more he partakes of the Divine Na-
ture. The very Name of Minos was odious to Pollarity, for no other rea-
son, but, because he extended his Justice no farther than his Dominions:

Each Country groaned under Minos Yoke.

Now what some have fancied, namely, That, Inter Arma cessant Leges,
In War all Laws lye asleep, is so far from truth, that no War ought to be
undertaken, but for the prosecution of a man's Right; nor any that is under-
taken, managed beyond the bounds of Justice and Faithfulness: It was very well
said
said of Demosthenes, That War might justly be made against those, who cannot be compelled to do us right in a judicial way. Now against such as are sensible of their own weakness, judgments are forceable enough, and so no need of War: But against such as are, or think themselves of equal strength, if they will not do right, War may be justly undertaken, which also that (they may be altogether righteous) must be managed with as much confidence, as judgments are usually passed. Admit then that Laws may sleep in the midst of Wars, yet they must be those only that are Civil and Judicial; such I mean as are proper to peace, but not such as are perpetual and fitted unto all times. It was very well said therefore by Dion Phufænus, That written Laws are of no force amongst Enemies, but such as are unwritten: That is, Such as Nature herself dictates, or the consent of Nations constitutes, are in force even in the midst of Arms. When one asked King Alphonfus, Whether he thought himself most indebted to Books or Arms; he readily answered, That he was beholding to his Books, both for the knowledge of his Arms, and also for his knowledge of the Laws of Arms. So also Plutarch, Sunt apud bonos viros quae-dam & belli jura; Amongst good men there are some Laws to be observed, even in War: Neither are we so to prosecute Victory, as to enrich our selves by base and dishonest gain. This appears by that ancient form of the Romans, These things I judge ought to be acquired by a just and pious War. These very ancient Romans (as Varro notes) were very slow in making War, and not very licentious when they did make it, because they approved of no War but what was pious. Camillus was wont to say, That War was to be waged with no less Justice than Valour. The like Testimony doth Scipio the African give of the People of Rome in his time, namely, that they always began and finished their Wars justly: And another Author tells us, That there are Laws for War as well as for Peace. A third admires Fabritius for a gallant Soldier, but principally for that which in War was very rarely found, namely, his Innuence; as believing that some things usually done against an Enemy were impious: What great power and efficacy the justness of a Cause hath, Historians do everywhere declare, whilst they oftentimes ascribe the Victory to this, as to its principal cause. From whence arise these Proverbal Sayings, The Courage of Soldiers do either rise or fall, according to the equity of their Cause. He seldom returns in safety, that willingly engageth himself in an unjust War. A good Cause is never unattended with hopes. Thus Pompey in Appian cheers up the Spirits of his Soldiers, We, faith be, must place all our confidence in the Gods, and in the goodness of our Cause; as having entered into this War upon honest and just grounds, for the defence of the Common-wealth. Thus likewise doth Cassius encourage his Soldiers by telling them, That the greatest hopes were always, where there was the best Cause. The like we may read in Josephus, Abs quo flat Jus, ab eo Deus; Where the Right is not, God is not. Many such like sayings we find in Procopius: 'As that of Belisarius upon his expedi-
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ation into Africk, where he tells his Army, That Valour never gets the Victory, unless accompanied with Justice. And in another Speech of his, before the Battel fought near Carthage, We appeal, faith he, to God for witnesses, the smallest Atom of whole Power is able to over-balance all humane strength: He, as we believe, weighing justly the Causes of the War, will give success to this Battel that are due to both Parties. The truth of which saying, the Admirable Event of that Fight, did presently after undoubtedly prove. Thus likewise Totilas be-speaks his Goths, It cannot be, faith he, it cannot possibly be, I say, that they that use Violence and Injustice, should gain Honour in Battel. Sed prout vita cuique est, ita ei obtingit belli fortuna; But according to every mans Life, so is his fortune in the War. It was therefore well advised by Agathias, Injustice and the Contempt of God is at all times to be abhorred as dangerous; but then most, when the Fortune of the War is to be determined by a Battel. Neither should any man be discouraged by reason of the prosperous success of some wicked designs: For it suffices, That the righteousness of the Cause, hath a very great efficacy to excite Valour, and stir up to Action, although that Power (as it often falls out in humane affairs) be sometimes hindered and frustrated in its effects by the intervention, or opposition of some other Causes. Besides the Opinion that men have, that the War is neither rashly begun, nor unjustly managed, is very prevalent to contrat Friendship, whereby as private men, so Nations and Kingdoms reap infinite advantages. For no man will willingly affect himself with those, who have no regard to Justice, to Piety, to Fidelity.

Now upon the Reasons above recited, concluding with my self, that there was a certain Law common among Nations, guiding them as well to, as in the Wars, I had many, and those very weighty motives, that induced me to compile this Treatise of it. For I very well saw throughout the Christian World so great a licence of making War, and of running into Arms upon every light cause, and sometimes upon none at all, that even the Barbarians would have been ashamed to have owned it. And also, that Arms being once taken up, there was no reverence at all had to Laws, either Divine or Humane; but just as if some Fury had been sent out to kill and destroy: so War, being begun, a general licence was granted to work all manner of Mischief whatsoever. The consideration of which barbarous Cruelty, gave occasion to many men, not evil, to teach, That it is not lawful for a Christian (whose Religion principally consists in promoting Love and Charity amongst all men) to take Arms: With whom Ferus and our Countryman Erasimus seem sometimes to accord; both of them being great Lovers of Peace, Ecclesiastical and Civil. But, as I suppose, with that intent only as we usually have, when we bend a stick, in it self crooked, so far to the other side, as may probably upon its return make it straight. But this every design of too much contradiction, is so far from doing good, that it doth much hurt; because that we may easily perceive, that their urging of these things too far, doth detract from their Authority in other things, though
though bably true. We ought therefore to moderate between these two, as well, that all things may not be admitted to be lawful in War, as that nothing.

Moreover, another design I had, namely, that being unworthily banished mine own Country, which with so many of my Labours I have honour’d, I might promote now by my private Studies, the knowledge of the Laws, which heretofore I practis’d in publick Offices, with as much Integrity as I possibly could. Many have endeavoured heretofore, to reduce this into the form of an Art; but none, as yet, have done it. Neither indeed can it be done, unless (what no man bath yet taken sufficient care of) those Laws which are established by Humane Authority, be rightly separated from those that are Natural. For the Laws of Nature being always the same, may easily be collected into an Art: But those that arise by Constitution, seeing that they are both often changed, and are also diverse in diverse Nations, are put without Art, as the Collections of such things as are singular. But if the Doctors of true Justice, would but undertake to treat of the parts of Natural and Perpetual Jurisprudence, setting aside what hath its rise from the Freedom of the Will; so that one would treat of Laws, another of Tributes, another of the Office of a Judge, another of the Conjecture of Wills; and another, of the proofs of Matters of Fact. Then by a Collection of all these parts, a Body may be composed.

But what Method we thought fit to use, we have shewed rather in deeds than words, in this Treatise, which contains that part of Jurisprudence, which is by far the most Noble. For in the first Book, having discovered the Original of Right; we have handled this General Question, Whether there be any War that is Lawful? And next, to the end that the difference between a publick and private War, may be the more easily discovered, we thought fit to explain the Just Rights of the Supream Power, what People may have it, and what Kings: and which of these have it, either fully, or in part only. And again, which of them may have it with a Power of Alienation, and which otherwise: And then we were to speak of the Duty of Subjects towards their Lawfull Prince, or to their Superiors.

Our second Book, undertaking to expound all the Causes from whence a War may arise, shews at large, what things are common, and what private; what Right persons may have over persons; what obligation ariseth from Dominion; by what Rule Kingly succession is guided; what Right ariseth from Covenants and Contracts; what Interpretation is to be made of Leagues; what Force, and what Interpretation is to be made of Oaths, both publick and private; what may be due for damages done; what Sanction is due to Embassadors; what Right to bury the dead; and what the nature of punishments are, and the like.

Our third Book, treating of that which is in War lawful, and having distinguished between that which is not punishable, or that which among foreign Nations is defended as lawful, and between that which is altogether blameless, descends afterwards to the several kinds of Peace; and to all Covenants or Agreements made in War, which appears for this reason to be worth our (b) pains,
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The Law of Nature how proved, and how distinguished from other Laws.

Pains, because (as I have said) no man hath ever yet treated upon this subject; and they that have handled the parts of it, have left very much to other mens Industry. There is nothing of this subject extant from the old Philosophers, neither of the Graecians, (among whom, Aristotle indeed, had composed a Book, Intituled μιαμενα παιδευμα, The Rights of War): nor among the Christians, which yet, is a work very desiderable. Nay, of those Books wrote by the Ancient Romans concerning their Feudal Laws, there is nothing traduced unto us, but the bare Name. They that collected the summ of such Cases as they call Cases of Confidence; have, as of other things, so also of War, of Promises, of Oathes, and of Reprizals wrote whole Chapters. I have also seen some special Books written of the Rights of War, partly by Divine, as by Franciscus de Victoriva, Henricus Goricemus, Willielmus Mathaus, Johannes de Carthagena; and partly by Doctors of the Law, as by Johannes Lupus, Franciscus Arius, Johannes de Lignano, and Martinus Laudensis. But on so Copious an Argument, they all of them said but very little: And most of them so, that they have confounded things due by the Law of Nature, things appertaining to the Divine Law, things due by the Law of Nations, and things due by the Civil and Canon Laws, mixing them altogether, without either order or distinction. But what all these were most defective in, namely, the Light of Histories, the most Learned Faber, in some Chapters of his Semestria (but so far only, as conducd to his purpose, and alledging Testimonies only) hath endeavourd to supply. So also, did Balthazar Ayala, but somewhat more fully: and Albertus Gentilis yet more fully than Ayala, whose Labours, as I know they may be helpful to others, and confess have been to me; so what may be wanting in him, either in the way of Teaching, or in his Method, or in distinguishing of questions, and of the kinds of diverse Laws, I leave to the Readers judgement. This only I shall say, That in his decision of Controversies, he usually follows either some few examples, not altogether to be allowed; or he is led by the Authority of some Modern Lawyers in their Answers; many whereof, were framed in favour to their Clients, more than to the Nature of Justice and Equity.

The Causes that render a War either Just or Unjust, are not by Ayala so much as touched: Gentilis hath indeed described some general Heads, in such a way as pleaseth himself. But many places of such Controversies, as are both Noble and very frequent, he hath not so much as glanced at. Now lest any such should escape us, we have adventured to discover the very foundation, whereupon we may build our judgement, so that it may be easier to decide any such question, as shall happen by us, to be omitted.

It remains now, that we briefly declare, by whose assistance, and with what care we undertook this Work. And in the first place, My care was, to refer the proof of such things as belong to the Law of Nature, to such Notions as are so certain and undoubtedly true, that no man without wronging his own judgement, can deny them. For the principles of that Law, if rightly observed, are as plain and evident of themselves almost as those we discern with
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with our outward Senses, which if our Organs be rightly disposed, and other things (thereunto necessary) not wanting, cannot deceive us: Therefore Euripides brings in Polynices affenting the righteousness of his own Cause, thus.

These things being plain and regularly due,
Both Learn'd and Unlearn'd must confess are true.

Whereunto be presently adds the Judgment of the Chorus (which after the manner of the Barbarians, consisted all of Women) acknowledging the truth of what Polynices had said. The same Author in another place brings in Hermione saying,—

We live not like Barbarians here, Irow.

Whereunto Andromache answers,

Yet what with them is ill, with us is so.

For the proof also of this Law, I have likewise produced the Testimonies of Philosophers, Historians, Poets, and in the last place Orators: Not that they are all either equally, or rashly to be believed, for they speak many things in favour to their own Sect, and to the Argument or Cause they undertake to defend; but that which many wise men, living in several Ages and in several places, do all of them affirm to be true and certain; that, I say, ought to be referred to some universal cause, which in these Questions brought by us, can be no other than either some inference directly drawn from the very Principles of Nature, or from the common consent of all Nations. The former shows the Law of Nature, the latter the Law of Nations. The difference between these is not to be understood by the Testimonies themselves, (for the Laws of Nature and Nations are every where by Writers promiscuously used) but by the quality of the matter; for that which cannot be deduced from certain Principles, by certain and concluding Arguments, and yet every where appears to be observed, we may conclude hath its rise or beginning from the freedom of the Will: And therefore I alone have endeavour'd to distinguish these two, not only one from another, but both of them from the Civil Law. So also in the Law of Nations, I have distinguished that which is truly, and in every respect Right, from that which hath only got a certain outward effect like unto that of Primitive Right, namely, that it may not lawfully be resisted, or, that it ought every where to be defended even by publick force, either by reason of some profit, or that some greater inconveniences may be efectuated; which how necessarily it is to be observed, will appear in the contexture of this ensuing Treatise. Nor have I been less careful to distinguish between those things that are Right, strictly and properly
perly taken, whence ariseth the obligation to Restitution: And those things that are so accounted; because to so otherwise would be repugnant to some other doctrine of Right Reason; of which diversity of Right, we have said somewhat already both here and above.

Among Philosophers, Aristotle deservedly claims the Precedence, whether we consider the order of his Treatise, his acute distinctions, or the strength and weight of his Reasons. Only I wish that this Principality of his, had not for some ages past, degenerated into Tyranny; so that Truth (for the discovery whereof Aristotle took so great pains) finds no greater Oppressor than the very Name of Aristotle.

I, as well here as elsewhere, do challenge to my self the liberty of the ancient Christians, who would espouse no Sect of Philosophers: Not that they were of their Opinion, who held, That nothing could be known, (than which nothing can be more absurd,) but that there was no Sect that could discern all Truth, nor any but what held something that was true: Wherefore to collect Truth thus scattered, and through so many Sects dispersed into one Body, this, they conceived to be nothing else, but to deliver a Doctrine truly Christian. Thus thought Justin Martyr, as appears by the first of his Apologeticks, The Doctrines of Plato were not much different from those of Christ, nor were they altogether the same: So neither were the opinions of the Stoicks, Poets, or Historians; for every one of them having some impres of Reason, saw in part, what was sentientaneous thereunto, and so far they said what was right. For those very manners, faith St. Augustin, which Cicero and other Philosophers so highly commended, are both taught and learned in all our Churches now flourishing through the world. And in another place speaking of the Platonists, he faith, That some few things being corrected, they might pass for Christians.

It was not without cause that some of the Platonists, and ancient Christians, dissented from Aristotle in this. That he placed the very nature of Virtue in a mediocrity of Affections and Actions, which being thus placed, drove him to this, That he compell'd two several virtues, namely, Liberality and Parsimony, into one: And gave unto Truth two Opposites, not equally distant from it, namely, Vanity, and Virtue; and imposed the name of Vice upon some things, either not existing, or which of themselves are no vices, as the contempt of Pleasure and Honour, and a vacuity of Anger against men. But that this foundation of his, if taken universally, is not rightly laid, will appear even from Justice itself, whose opposites (being too much or too little) when he could not find in the affections and their subsequent Actions, he was enforced to seek for both in the very things themselves, about which Justice was conversant. Which very thing is in the first place to leap from one Genus to another, which he deservedly blames in others: And in the next place, To receive less than what is our due, may have somewhat of Vice adhering unto it as Circumstances may happen. For it may be, that what any man so abates,
be may owe to the relief of either himself, or of his Relations. But certainly it cannot be repugnant to Justice, which wholly consists in abstaining from what is another man's: Such another fallacy is this, that he would not have Adultery proceeding from Lust, and Murder proceeding from Anger, to belong properly to Injustice; whereas notwithstanding Injustice is nothing else but the detention of another man's Right, whether out of Lust or out of Anger, or out of an unadvised Charity, or out of an Ambition or Vainglory (from whence the greatest injuries do usually arise) it matters not. For to trample upon all temptations whatsoever, rather than to dissolve Humane Society, this truly is the proper work of Justice.

But to return from whence we came, True it is that to some virtues, it falls out so, that the affections must be moderated, but not because it is proper and perpetual to all virtues that they should be so; but because Right Reason, whereupon Virtue always and everywhere attends, doth in some prescribe a measure to be followed, whereas in others it excites to the highest degree of what we can do. It was well said of Agathias, Of the motions of the Mind, those are simply and altogether to be embraced, in which that which is agreeable to our duty, and worthy our choice, is found and sincere. But in those which may haply decline unto evil, we must not simply and absolutely follow, but so far only as is convenient: Prudence is a pure and uncorrupted good, which none will deny. In Anger, that which stirs us up to action is commendable, but that which exceeds moderation, to be avoided as being damagable. Love God too much we cannot; for Superstition sins not in this, that it worships God too much, but in that it worships him perversely: Neither can we be said excessively to desire things that are good, and that are eternal, or excessively to fear those torments which are everlasting, nor too much to hate sin: It was therefore truly said of Gellius, Some things there are of so vast extent, that they will admit of no bounds or moderation, and that are so much the more praiseworthy as they are greater and larger. La-stantius when he had largely discoursed of the affections, said, Non in his moderandis sapientiae ratio versatur, &c. True Wisdom consists not in the moderation of these, but in the causes of them; because these are moved by some things that are without us: Neither should a restraint be put principally upon them, because they may be but small in the greatest crime, and they may be very great without any crime.

Our purpose is to magnifie Aristotle, but with the same freedom as he himself took against his Masters in favour to Truth: Histories have a double use as to the matter in hand; for it supplies us with examples and Judgments in most cases. As for examples, The better the Times and the People were, the greater was their Authority; for which reason we make choice of the ancient Grecians and Romans, rather than of others: Neither do I despise their judgments, especially when they agree: For the Law of Nature (as we have said)
The holy scriptures.

Not repugnant to the Law of Nature.

The Old Testament not useles since the New was published.

A greater sanctity required by the Gospel than by the Law of Nature. Precepts distinguished from Councils.

Canons Ecclesiastical.

is in some measure from hence proved; but the Law of Nations cannot be proved otherwise. The Opinions and Sentences of Poets and Orators, are not of so great Authority; but yet we sometimes make use of them, not so much because we count them Authentick or Authoritative, but rather as Ornaments to Confirm what otherwise we do prove. Of the authority of such Books, as holy men by the afflute of Gods Spirit, have written or approved, we often make use, yet with some difference between the Old and New Testament: The former is by some quoted for the very Law of Nature, but without doubt erroneously, for many things therein do proceed from the free will and pleasure of God, which notwithstanding is no whit repugnant to the truth of the Law of Nature; and so far Arguments may be rightly drawn from thence, so that we carefully distinguish that Law of God, which God by men doth sometimes execute, and that which men execute among themselves. We have, as nearly as we could, avoided both this error and another contrary unto it, which is, that after the times of the new Covenant, there is no use at all to be made of the Old. As to this we are of a contrary Judgment, as well for what we have already said, as because such is the Nature of the New Law, that whatsoever is commanded in the Old, appertaining to Virtue and good manners, the same or much greater is commanded in the New. And after this manner do the ancient Christian Writers make use of the Testimonies drawn from the Old Testament. But to the right understanding of the sense of the Books of the Old Testament, we have no small help from the Hebrew Writers, especially those who were thoroughly instructed in the language and manners of their own Country. The New Testament I do also make use of, to instruct Christians in what is lawful for them to do, which cannot be elsewhere learned; which notwithstanding (contrary to some who have done) I have distinguished from the Law of Nature: Being most assured that in that most holy Law, a greater sanctity is commanded, than that which the Law of Nature doth of it self require. Neither have I omitted to observe, what is rather commended unto us than commanded, so we may understand that to do contrary to that which is commanded, is impiety, and renders us liable to punishment; but eagerly to aspire to that which is most excellent, as it argues a noble and generous mind, so shall it not want its due reward.

Synodical Canons if they be right, are nothing but Collections drawn from the general sayings of the Divine Law, and fitted to particular cases which do usually happen: These also do either point out what the Divine Law doth enjoy, or exhort us to that which God commends unto us: And this is the office of the true Christian Church, faithfully to traduce unto others what God hath delivered unto her, and after the same manner as they were delivered. But even the Customs used among those ancient Christians, and that were worthy of that Great Name, being either generally received, or praised, are deservedly to be ranked with the Canons.

The Fathers. After these, the second Authority is of those who were in their times famous among Christians, for either their pious lives or doctrines, and were as yet ne
ver noted for any great error. For even these men also ought to be had in good esteem, as to what, with great asseveration, they affirm, and have found out to be true in the interpretation of such places of Scripture as seem to be obscure: And the more, by how much both their consent is the greater; and they draw nearer to the times of the first purity, long before any Supremacy was injured, or any Sects or Factions known to adulterate the Primitive Truth.

The School-men that succeeded to these, do often show the strength of their Wits; But they happened to live in very unhappy times, being altogether ignorant of good Arts: No marvel then, if amongst many things which are in their Writings Commendable, there are some that are Pardonable. And yet when they agree in matters of Morality, they seldom err, being very quick-sighted to discern what in the sayings of other men was to be reproved: And yet, even in this very endeavour of theirs to defend their diverse opinions, they furnish us with great examples of Modesty, whilest they contend among themselves with Reasons and Arguments; and not, as the Custome now begins, to deface our Books with reproaches, the spurious issue of weak and effeminate minds.

There are three sorts of those that profess the knowledge of the Roman Laws: The first are they whose pains appear in the Pandect, the Codes of Theodosius and Justinian, and in the Novel Constitutions. The Second sort are they who succeeded to Imnerius; as Acursius, Bartolus, and many more, who at that time governed the Courts of Justice. The Third sort are of those who joined Humane Learning, with the study of the Laws. To the first I confess I owe much, as well for the solidity of their Arguments to prove that which appertains to the Law of Nature; as also for the Testimonies they often give, both to that Law, and not much less to that of Nations; yet so, that even they, as well as others, do often use these names promiscuously, misapplying that to the Law of Nations which is in force, but among some people only; and that not by any Consent or Agreement, but because they take it one from another by Imitation or by Chance: Yeas, and even those things that belong truly to the Law of Nations, they oft-times handle confusedly and indifferently, with those that belong to the Roman Laws, as appears by the Chapters of Captives and Poffliminy. To distinguish these I have taken great pains.

The Second sort, regardless of the Divine Law and Ancient Histories, endeavour to determine all Controversies between Kings or People out of the Roman Laws, assuming some things from the Ecclesiastical Canons. But these also were often frustrated by the infelicity of the times, so that they could never attain to the right understanding of those Laws, although otherwise acute enough, to search into the Nature of what was Good and Right: Whereby they often became good Law-makers, though not so good Expositors of Laws already made. These, therefore, are then to be hearkened unto, when they give Testimony
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Thirdly. Of such a Cus tome as now passeth for the Law of Nations.

And of those of the Third Form, who confine themselves wholly within the bounds of the Roman Laws, and never, or at leaft very seldom expinate into that Law that is common, there is but very little use to be made to our purpose: These men having joyned their School subtilties with the knowledge of the Laws and Canons, abateit not from the deciding of all Controversies between Kings and People. Among them are two Spaniards, namely, Covarruvia and Valquiis: This latter using great Boldness; the former much more Modesty, and not without found Judgement. The French fally rather to interfect History with the study of the Laws: The chief whereof are Bodine and Hottoman: The former in a continued Treatife; the latter in some scattered Questions; whose Judgements and Reasons often supply as with matter to find out the Truth.

In this whole Treatife I chiefly propose to my self Three things: First, To make the Reasons of my Definitions as evident as I can. Secondly, To dispofe the things I am to treat of, into a certain Order and Method. And Thirdly, Clearly to distinguish those things which seem to be the same, but are not. I have purpojely abailed from that which be longeth to another Treatife: As from those things which teach us what is of Common use to be done; because these have an Art peculiar to themselves, to wit, the Politicks; which Aristotle rightly so handled by it self, that he mixt nothing of any other Art with it; whereas Bodine on the contrary, confounds that Art with this of ours. Yet in many places, I have glanced at that which is profitable: But on the by, and only that I may the more clearly disjij it from that which is jut. Whosoever thinks that I have any regard to the Controversies of this age, either those already on foot, or those that may be easi ly foreseen, will make me wrong. For I confefs truly, That as Mathematicians confider Forms abjifled from Bodies; fo I, in treating of Right, have withdrawn my mind from all singular facts. As to the Stile, I was unwilling to oppoff my Reader with a multitude of Words, added to a multitude of Things, to be treated of, whom my purpose is only to Instruct. Therefore I chose rather to express my self in as plain and concise a way as I could, as being most convenient for him that would Teach others: That is, they that are to transact Public Affairs, may at one view, see both what kind of Controversies do usually arise, and by what principles, their Judgement may be guided to determine them: Which once known, will be no difficult thing to fit their Discourses to the subjeft matter, and to enlarge them themselves upon it as they please. I have also brought in the Ancients sometimes speaking their own words, wherelover they seem to be spoken, either with some Gravity, or with some singular Elegancy: Which I have also sometimes done the Greeks; But then especially, when the Sen
tence was either brief, or when I could not so gracefully translate it into Latin. Which notwithstanding I have always subjoined, for the benefit of those who are not expert in that Dialect. The same Liberty that I have herein taken, in judging of the Sentences and Writings of others, the very same, I say, do I heartily beg and intreat all, into whose hands this Book of mine shall come, to take in judging of me, and mine. They shall not be more ready to Admonish me of mine Errors, than I shall be to Retract them, and to follow their Advice. And even now at this present, if there have fallen from me in this Treatise, any thing that is dissonant to Piety, to Good Manners, to the Holy Scriptures, if any thing disagreeing from the consent of the Catholick Church; or from any Truth whatsoever, I wish, with all mine Heart, it had never been spoken.

Hugo Grotius:
THE

CHAPTERS

Of the First

BOOK.

I. What War is, and what Right,
II. Whether it be lawful at any time to make War,
III. War divided into Publick and Private; The Supream Power explained,
IV. Of War made by Subjects against their Superiors,
V. Who may lawfully make War,

The Chapters of the Second Book.

I. Of the Causes of War; And first of War made in our own Defence,
II. Of such things, wherein Men have a Right in Common,
III. Of Originary Acquisition of Things; Of the Sea and Rivers,
IV. Of a Presumed Dereliction, and the Occupancy following; And wherein it differs from Prescription and Usuaption,
V. How a Right over Persons was Originally gained: Of the Right of Parents over their Children; Of Matrimony, Colleges or Societies: Of the Right of Kings over Subjects, of Masters over Servants,
VI. Of that Right that is derivatively acquired by the voluntary fact of a Man; wherein is handled the Right of the Alienation of Empires, and the things thereunto belonging,
VII. Of that Right that is acquired by Law, and of Succession from an Intestate,
VIII. Of Dominion vulgarly said to be acquired by the Law of Nations,
IX. How Empire and Dominion may cease,
X. What Obligation ariseth from Dominion,
XI. Of Promises,
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XIV. Of the Promises, Contracts and Oaths of Soveraign Princes,
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XVII. Of
XVII. Of the Damage done to one man through the default of another: And of the obligation thence arising,

XVIII. Of the Right of Embarrasses,

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XX. Of Punishments,

XXI. Of the Communication of Punishments,

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XXIV. War though just, not to be undertaken rashly,

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I. Certain General Rules, shewing what by the Law of Nature may be lawful in War, where also of Fraud and Lying,

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IV. Of the Right of killing Enemies in a Solemn War, and of other force on

V. Of Spoil and Rapine committed in War,

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**Hugh**
Hugh Grotius

OF THE

RIGHTS

OF

PEACE & WAR.

BOOK I.

CHAP. I.

What War is, And what Right is.

I. The order of the whole Treatise.
II. The Definition of War, and the original of the word, Bellum.
III. Right, as it is Attributed to Action, defined, and divided into that which concerns Governors, and that which concerns Equals.
IV. Right taken for a Quality, divided into Faculty and Aptitude or fitness.
V. Faculty briefly taken divided into Power, Dominion and Credit.
VI. Another division of Faculty into that which is vulgar, and that which is High and Eminent.
VII. Aptitude what.
VIII. Of Expletive and Attributional Justice, not rightly distinguished by Geometrical and Arithmetical proportions, nor in that this is conversant about things common, that about things private.
IX. Right as taken for a Law, how defined and divided into Natural and Voluntary.
X. The Law of Nature defined, divided, and distinguished from such as are not properly so called.
XI. That Natural Instinct, either common with other living Creatures, or proper to men, doth not constitute another distinct Law.
XII. How the Law of Nature may be proved.
XIII. The Voluntary Law divided into that which is Humane and that which is Divine.
XIV. Humane Law divided into that which is Civil, that which is more strict than Civil, and that which is more large, which is also called the Law of Nations, how explained, and how proved.
XV. The Divine Law divided into that which is Universal, and that which was particularly given to one only Nation.
XVI. That the Law peculiarly given to the Hebrews did not oblige strangers.
XVII. What Arguments Christians may draw from the Hebrew Law, and how.

A LL Controversies between such as are not associated under one Civil Law, as between those who never yet entered into any Civil Society, or that are among themselves of several Nations, whether they are private Subjects, or such as are invested with Sovereign Power, whether Kings, Nobles, or Free people; All such Controversies, I say, are to be referred to the times, either of Peace, or War. But because the end of War is Peace, and that there is no such Controversie but may produce War, therefore what differences ever do arise by the occasion of the Rights of War, shall in the first place be exactly discussed: That f6 War it self, being duly prosecuted, may lead us unto Peace, as to its proper end.

B Being
Being therefore to treat of the Rights of War, it concerns us in the first place to know what that War is, whereby we are to treat, and then, what that Right is that we search for. War (as Cicero defines it) is "Civile per vim, a Debate by force": But custom hath Translated the signification of the word, from the Act it self, to the state and condition of those that make War, for as Philo well observeth: They only are not Enemies that are actually engaged in Battle whether at Sea, or Land, but they also, that raise Forts, plant Ordnances, or such like Engines of War on their Walls, or Ports, though at present they fight not. Servius upon those words of Virgil, concerning Aeneas,

In War and Arms None greater was than He,

makes this distinction, By War we understand all consultations and Preparations for War: but by Arms only the use or exercise of them. Therefore in another place he concludes, that all that may be reckoned at one time of War, wherein either things necessary for the conduct be preparing, or the fight is self left; so that War may be defined to be the State or Condition of those that contend by force as such: Which general acceptance of the word comprehends all the kinds of War whereof we are to treat, not excluding that which sometimes happens between private persons as Duels or single Combats, which certainly are precedent to those Wars that are publick, and being of the same nature, may well be comprized under the same proper name. Which serves the Original word will very well bear, for from the Old word Dulium is made this new word Bellum, as of Dussum is made Bonus, and of Dies, Bis. Now Dulium signifies a contest between two, in the like fence as we express Peace by Unity, or as the Greeks do War by συμμαχίας, in respect of the Multitude of people that are engaged in it; as also they sometimes do by the words μόνος and δίος, in respect of those direful effects that attend it. Now as the Original of the word will justify this large signification, so will the common use thereof. But if it be objected, that this word is taken generally for that contest by force of Arms, that is publick, I answer, that this argues not that single Combats may not also be so called; For most certain it is that the name of the Genus doth often peculiarly adhere unto that of its Species, which is most excellent. As to Justice, I do not admit of it in this definition, because it is the Subject of this whole Treatise to enquire, Whether any War be Just, and what War is so. But that which we seek, must be distinguished from that concerning which we seek.

Whereas the Subject of this whole Treatise is The Right of War, we are in the first place to understand, (what we said just now) whether any War be Just? And in the next place, what it is in War that is Just? For we understand in this place by the word, Right, that which is just: And that also, rather in the Negative, than in the positive fence, foas we here term that Just, which is not unjust. Now that we account unjust which is repugnant to the Nature of a Rational Society: As for example, to rob another to enrich our selves, is (as Cicero observeth) contrary to Nature, which he thus proves; if this, faith he, were allowed, all Society and Communion between men, would quickly be dissolved. So for one man to betray or deceive another is unjust, as Florintius proves, because it breaks that bond of Alliance, wherein Nature hath linked together all mankind for mutual defence. Which Seneca thus illustriates: Just as all the members of the body ought to be equally solicitous one for another, because in the preservation of each part, conflicts the welfare of the whole; so ought all men to forbear each other, because they are born for Society. For it is not possible for any Society long to stand, unless every part thereof be cherished and defended by the whole. So in another place: That Society is Faithfully and religiously to be preferred, which so Unites us one to another, that we all agree in this. That there is somewhat whereunto all mankind hath a Common Right. But as of Societies, some confilt of Persons that are equal, as that of Brothers, of Citizens, of Friends and Allies: and some consist of Persons that are unequal, (and these also vary according to their degrees of Excellency) as that of Parents and Children, of Masters and Servants, of Kings and their Subjects, God and Man (for such a Society there is, if Philo and Plutarch decide us not.) Even so things may be said to be just or unjust respectively; for one thing may be just in respect of those that live together being Equals, and another thing may be just in respect of the persons Governing, and the persons Governed as such; whereas this shall be said to be the Right of Rulers, and that the Right of Equals.

There is also another signification of the word, Right, which though different from this, doth notwithstanding arise from it, and respects the qualification of the person, in which hence it signifies a moral Quality in any perfon, sufficient to enable him justly to have or to do something. Now this Right appertains to the Perfon, though it be sometimes but in relation to the thing he holds, as services for Land held of a chief Lord, and these are called real Rights, comparatively to those that are merely personal not because even these belong not to the person, but because they belong to no other but
but to him that enjoys the thing whereunto that service is annexed. This moral Quality, if perfect, we call Faculty; if imperfect, an Aptitude or fitness only: Anerurable whereunto in things Natural are, to That, an Act done; to This, a Power to do.

Which Faculty Civilians call that Right which a man hath of his own: but we henceforth call it Right properly and strictly taken: Under which are comprehended, First, a Power over our Selves, which we call Liberty; Then a Power over others, such as Fathers have over their Children, Lords over their Slaves: Secondly, Dominion, and that either full and Absolute, or Limited: As that which a Tenant hath in the profits of his Farm, for his Rent; the Right that a man hath to a thing Pawned. And Credits, to which are opposed Debts.

Now this Faculty is also twofold, that is to say, either vulgar, as that which every man hath over his Goods, to dispose of them as he pleaseth; or that which is more eminent, being superior to that which is vulgar, as that which every Society hath over the persons and Estates of all its members, so far as conduceth to the perfection of the whole. Thus doth Regal Power comprehend as well that of a Father, as that of a Master; so that a King, as he is a King, hath a greater Right in the Goods of his Subjects, so far as is necessary for the publick safety, than any private Subject hath in his own. Of this opinion was Philo the Jew, Surely both the Silver, and the Gold, and whatsoever else is held dear and precious to Subjects, are more in the Power of those that govern, than of those that possess them: Of the same mind also was Pliny, as appears by his Panegyrick, where speaking of a King he faith: Corpus eft quaestus omnium, what all men have, his. And again: Is there any thing that Caesar can see, that is not his? that is, whenever the Commonwealth hath necessarily require it.

That which before I called Aptitude or fitness, Aristotle expresseth by the word, Worthiness, Michael Ephesius by another word implying fitness or convenience. As for example, If a Question should be put To whom in duty we stand most obliged? The Answer, faith Cicero, should be, to our Prince, to our Country, to our Parents; Because from them we receive the greatest Blessings we enjoy; next to those, we stand engaged to our Children, to whole Families, whose dependence is upon us alone: Then to our master relations, who for the most part do claim a Share in our fortunes. Wherefore all these we are bound to relieve with all things necessary for life, but especially these above named: But to Eat, to Drink, to converse with, to exchange, to advise, to comfort and sometimes to reprove, these are the proper Offices of Friendship. So being to make our will, we consider who hath best deserved of us, Quamvis dignissimos quisque solet tradamus, we seek out such as are most worthy to whom to bequeath our Estates.

Explicative Justice, which hath now gotten the name of Justice strictly taken, hath a respect to that which is our own, which Justice, Aristotle by too narrow and pinch a word, calls Commutative Justice; For that he that is pollent of what is mine, should restore it to me, is not by Commutation, and yet it belongs to this Branch of Justice: And therefore in another place he finds out a more apt and pertinent word to express it by, calling it expatiavimum, A Justice that makes the balance even, or that repairs and restores to the full. Attributional Justice, which is called by Aristotle, Distributive Justice, hath a respect to aptness, worthines or convenience, and is usuall the Concomitant of such Virtues as are beneficial to others, as mercy, liberality, and State Providence But whereas the same Aristotle faith, that Explicative or Commutative Justice hath respect unto a simple and Arithmetical proportion; but Attributional, to a Comparative, which he calls a Geometrical proportion, as being the only proportion owned by Mathematicians; and which Caffidore calls the comparing of mens habits or dispositions, and not unlikey by Homer described in this verse,

Things best to best, be grave, mean things to mean.

This may hold in some cases, but not in all; neither doth Explicative Justice of it self differ from Attribution in such use of Proportions, but in the matter whereabout it is Converqant, as is before shewed. Therefore as in all Elections made by Societies, if there be severel Competitors the Choice is made by a Comparative Proportion, for Dator dignitari;
What Right is, What the Law of Nature.

BOOK I.

digniori; the worthiest is chosen: if there be no Competitor, and one only be found worthy of such a publick office, it is attributed to him by a simple proportion. Neither is that more true which some affirm, that Attributive Justice is Convertent only about things Common, but Expletive about things private, that is, appertaining to particular men. For on the contrary, if a man shall go about to bequeath his Estate by Will, he doth it by Attributive Justice, dispensing it according to the worthiness of the persons that are to receive it: And a City which renders out of that which is Common, what some of her Citizens have bestowed in publick, doth it by the Rule of Expletive Justice, not regarding the worthines of the persons, but the bare Right of him that ought to receive it. This young Cyrus learnt of his Tutor in this case: There were two coats that had two coats, both of different Dimensions, the bigger Boy had the lefser coat, and the lefser Boy had the bigger coat, which the bigger Boy took from him, being fit for himself, leaving him the lefser coat, which also was fit for him; whereas Cyurs being made judge, and regarding more what was fit and convenient, than what was just and Right, adjudged the greater Coat to the bigger Boy, and the little Coat to the lefser Boy: But his Tutor told him, That he had done amiss: For had he been to judge what was fitst, he had done well: But being to judge, whose each Coat was, he was to regard who had the best right to it, he that by force took the great coat away, or be that made it, or bought it. This is it that Moses in his Law forbids, saying: Thou shalt not regard the Poor in judgment, but shoulk judge thy Neighbour with Righteousness: Which cannot be done, unless we do (as Philo adviseth) A personum ligamini res alio where, Consider the matter, without regarding the parties contending. There is also a Third signification of the word fras, or Right, which makes it Equiva
tent to the word, Lex, that is Law, when taken in its largest sense; that is to say, as it is rule to Moral Actions, obliging us to do that which is right: In which sense it was that Horace took it where he saith,

For fear of wrong, strict laws invented were.

So in another place: fras neget sibi data;

He may deny that Laws for him were made.

Which the Scholiast thus expounds: He was a man that despised all Laws. In which Definition we say first, that it must oblige, and herein it differs from Counsel and other prescriptions, which though honest, yet fall not under this Notion of Law. And as for permission, to speak properly, it is not the Action of Law, but the denial or Refri
ction of that Action, unless it be, as it obligeth another not to give him to whom such permission is granted, any lett or impediment. Besides, it must oblige us to that which is Right, and not imply to what is just, because Right in this sense, doth not belong to Justice alone, (such I mean, as we have heretofore explained) but unto the matter of other Ver
tures: An example whereof we have in that Law made by Zelomen, who ordained a punishment to be inflicted upon him who contrary to the advice of his Physician preferred to drink Wine. And therefore that Right which this Rule guides us unto, must needs be of a larger signification than that which is simply just. Of this Right to taken, the best partition is that of Aristotle's, into that which is Natural, and that which is Voluntary, or as he there calls it legitimate, the word Law being taken in the stricter sense, which difference is acknowled
ledged both by the Hebrews, and the Grecians, who when they would speak properly, diftinguished them by their proper names.

That which we call natural Right, or the Law of Nature, is the dictate of Right reason, shewing the Moral Malignity, or the Moral Necessity that there is in any Act, by either the Repugnancy, or Congruity, it hath to Rational Nature it self, and consequently, that such an Act is either commanded or forbidden by God, who is the very Author of Nature. Or as Philo describes it: Right reason is a Law that cannot lie, it is not Mortal, nor given by any thing that is Mortal, it is not livelie, nor written in Paper, or insculp upon Pillars that are livelie, but it is an immutabie and immortal Law, being engraven by an immortal hand, on a mind that is immortal. Cicero, as Laelius quotes him, gives this excellent description of it: Right reason is a perfect Law that will not lie, it is most agreeable to humane Nature, and Universally diffused throughout all mankind: It is incor
corruptible, immortal, which commands us to our duty by commanding it, and drives us from all fraud by forbidding is; neither are its Injunctions or prohibitions in vain to the Righteous: though
though with the wicked they prevail not. To this Law nothing must be added, nor any part thereof detracted; and wholly to abrogate it, is impossible. It is not in the power either of the Senate or the people to abrogate us from our obedience to this Law, neither need we to seek after any other Expositor than the Law itself: Neither is it one Law at Athens, and another at Rome, one now, and another hereafter: But this one Law, being both Eternal and Immutable, shall bind all Nations and in all Ages: As there will ever be one Common Lord and Governor of all, which is God. He is the sole inventor, judge and giver of this Law, which he that refrests to obey, must fly from (and so unmanned) himself, and although he may fly from, and happily avoid all other (which are thought) punishments; yet for the wilful contempt of this only, he shall be severely punished. Now the Acts whereupon Right reason gives her Dictates, are such as are either good or evil, lawful or unlawful, simple and of themselves, and therefore must necessarily be understood to be either commanded or forbidden by God himself: And herein, the Law of Nature is different not from humane Laws only, but from the Voluntary Divine, for they do not command or forbid such things as are of themselves, and in their own Nature either due or unlawful; But by commanding them, they make them the one, and by forbidding the other. But for our better understanding of this Law of Nature, we must observe, That some things are said to belong unto the Law of Nature, not properly, or immediately, but (as the Schoolmen love to speak) by way of reduction, that is, for as much as the Law of Nature doth not prohibit them: As some things are said to be just, because they have nothing in them of injustice. And somethings are said to be lawful, which the Laws do neither prohibit nor punish. And sometimes by the abuse of the word, those things which our Reason approves to be honest, or at least, are soComparatively to those that are opposed unto them, though they are not enjoyned us, yet are said to be due by this Natural Law: Moreover we must observe, that this Natural Law doth not determine of such things only, as have no dependence upon Mans will, but of many things also which the Common consent of mankind hath already moulded (as it were) into a Law. Thus was Dominion, as now in use, by Common consent, introduced as by a Law: But being introduced, this very Law of Nature doth instruct us, that to take away from any man that which is his own without his consent, is impious; And from hence it is that Pauly the Lawyer concludes Theft to be prohibited by the Law of Nature: and Ulpian, that it is dishonest; And Julius tells us, That after that which concerns the Worship of God, there is a Second Law in its own Nature holy, and of Divine Extravagance, that enjoyns us at all times, and in all places, to abstain from Theft and Rape; and that forbids us either in words, or in our most retired thoughts to mix or confound each others Properties. For as Cicero out of Chrysippus well observes: For any man to gain to himself what is necessary for his own lively hood, is not unjust; but to take it away by force from any other, is not Right. Euripides also condemns this as hateful to God himself:

Namque odis ipsa virtus : Nee divites
Non ess rasps, sed probe partis cupit:
Spernenda, si non purus veniant, Copia est:
Communis Aetér hominibus, Tellus quoque
In qua Ampliare cuique se fas ess domum,
Ut ab aliquis rebus, ac vi temperet.

For God himself hates force, nor would that we
Grow rich by fraud, but Goods got honestly;
Riches unjustly gain'd, we should disdain:
The Earth, the Air, and eke the Ocean main,
Stand free to all, each may his House maintain
By thefe, so that from Rapine he abstain.

The Law of Nature is fo Immutable, that God himself cannot alter it; for though the power of God be Immenfe, yet may somethings be said, whereunto this great power doth not extend it self, because what are fo said, are said only, but have no fene which can exprefs the thing, but they must contradict themselves: As therefore that twice two should not be four, God himself cannot effect; so neither can be, that what is intrinsically evil, should not be evil. For as the being of things after they are, and as they are, depends not upon any other; so do the proprieties that necceffarily follow that being: But such is the Malignity of some acts, compared with Nature as it is guided by Right reason. And therefore doth God himself suffer himself to be judged of according to this Rule, as appears by that of Abraham to God: Shall not the Judge of all the world do Right? Such a contradiction it is to say, that he that is the judge of the whole Earth
The Law of Nature Immutable.

BOOK I.

Earth should not do Right, that though it may be spoken, yet do the words though spoken bear no sense, but rather imply a manifest contradiction. The like we may find in other places of the holy Scriptures; it sometimes notwithstanding so falls out, that in these acts concerning which the Law of Nature hath determined something, there is some shew or appearance of change, which may easily deceive the unwise; whereas indeed the charge is not in that Law which (as I have already said) is immutable, but in the things about which that Law is couerant: As for example, if he to whom I owe a just Debt, shall freely discharge me of it, I am not bound to pay it; not that the Law of Nature doth cease to command me to pay what I owe; but because that which I did owe, ceaseth to be my Debt being so discharged. For as Arrianus in Epitikes rightly argues, To make a just Debt it is not enough, that the money was lent, but it is required that the Obligation remains uncancelled. So when God commands any man to be put to death, or his Goods to be taken from him, Murder and Theft do not thereby become lawful, for these very words do imply sin, and no sin can be lawful. But those acts will not amount to Murder or Theft, which are done by the express command of him who is the Sovereign Lord both of our Lives and Fortunes. Lastly there are some things justifiable by the Law of Nature, not simply, but so long as the condition of affairs stand thus: So till dominion was introduced the use of things was Naturally common; fo before Laws and Courts of Judicature were established, by the Law of Nature, it was Lawful to recover by force what was our own, but not force.

That distinction which we may read of in the books of the Roman Laws, is, namely, that this immutable Law is either that which is common to men with beasts, which they call the Law of Nature in the stricter sense; and that which is peculiar unto men only which they sometimes call the Law of Nations, is of very little use. For nothing is properly capable of a Law, but that Nature that is capable of making use of General precepts, which was well observed by Hesiod, when he said:

To men hath God given Laws to be held by:
But Fishes, and Beasts, and Fowls that fear on high,
Having no Law, do on each other prey;
But in good Laws doth all our safety lay.

We say not of Huyeus and Lyons, faith Cicera, that they are just; neither as Plutarch observes, do we by Nature make use of Law or justice against any other Creatures but man. Among all other Creatures not endued with reason, faith Lactantius, Nature is permitted to be her own Carver, Neccess atis in fini postit; They destroy others to preserve themselves: And in so doing they are ignorant, that they do amiss. But man who hath a faculty to determine good from evil, wisely abstain from hurting others, though thereby he sometimes inconvenience himself. Polybius having declared upon what grounds men at first entered into Society, adds, That when the left few some men abusing their own Parents, and others behaving themselves injuriously towards their Benefactors; they could not chuse but grieve at it, whereof he gives this Reason: For mankind, faith he, being endued with understanding and reason above all other Creatures, it is not credible, that they should beheld acts so abhorrent from Nature without expressing some sign of discomfit. So likewise Cyprian, This we learn from Nature herself, that when we see one man abusing another, we cannot but sympathize with the injured Person, and feel with indignation against the injurer; although those injuries do not the least touch us. And the greater the wrong is, the greater is our indignation against him that did it. No man is equally incensed against him that cuts a perf only, as he is against him that commits a Murder. But if at any time Justice be contributed to Brute Beasts, it is improperly, and only by reason of some Anology or Relembalance that it hath to Humane Justice: As was that of the 30 Elephants recorded by Pliny, who could not by any means be provoked to be instrumental to the Cruelty of King Bacebus in worrying 30 other Elephants which he had bound to go many Trees on purpose to have them destroyed. And that all of the Ape, recorded by the same Pliny, who having been fed daily at a man's table, killed one of her own young ones for killing the mans son, by whom he had been fed; and would never afterwards come into the same house. These are said to be just acts, not properly, but only as they have some faint resemblance of Justice, and some light impressions of Reason. Seneca therefore denies that Damn beasts parray any thing of Humane passions; yet he acknowledgeth that they have somewhat that is like unto them: They cannot properly be said to be angry, yet have they some violent impulses like unto anger. Non viuit sed uterum simulacrum; they have no voices, but somewhat like unto Humane voices, as Origen pleads against Celsus. But whether the act itself secur'd upon the Law of Nature hath decreed, be common to us with other living creatures, as the education of our little, &c. or proper unto us only, as that God should be Worshipped; doth nothing appertain to the very Nature of Right. But
But that any thing may be due by the Law of Nature, is usually proved two waies, either by Arguments drawn a priori, or by such as are drawn a posteriori: Whereof the former are more convincing; the latter more vulgar and plausible: the proof by the former way is by flowing the necessairi convenience or repugnancy that there is in anything, with rational and Social Nature; for whatsoever can be proved to be necessary to the conservation of Humane Nature, and Humane society, must needs be instituted as a Law by the author of Nature, who is the God of order. That proof which is a posteriori is, when we can through not demonstratively, yet with very great probability, collect and conclude that to be a Dictate of the Law of Nature, which is unanimously believed to be so by all, or at least, by the most Civilized of all Nations. For if the effect be Universal, the cause must needs be so too: But of so Universal a perfection there can be no other cause probably given, than that feme it fell which is called common: That of Hefod hath been highly celebrated by many;

What Nations have aowd,
Ought not by private men be disallow'd.

Qua communiter ina evidenter sida sunt; that which to most men seems true, may be believed, faith Hadraclius. For we can have no stronger proof, or evidence of the truth of any thing that cannot be demonstrated, than the general consent of the wisest in all Nations that it is so. This Aritotle took to be of all others, the most powerful and convincing proof: Societ quid dicius omnis continentum; if so what we say all men give their consent. Of the same mind was Cicero, Whatever all Nations do grant, must needs be the voice of Nature: So Seneca also, What appears the same to all men, must undoubtedly be true. He that derogates from this faith can never expect to be believed himself, faith Aritotle: so likewise Tertullian, Qua adp aut mulus munum inventur, non aut errantium, fed traditum; What is approved of by the most, is not error but Truth. I said before that that must needs be a Dictate of Nature that was acknowledged to be so by all, or at least, by the most Civilized Nations, and adhered: for some people are so fierce and savage that they have hardly any humanity among them, as Prophyrse rightly observed. Now no man of sound judgment lwry, will impute this as a general reproach to all mankind: Surely this Law of Nature is immutable, and the same with all mankind that are of sound and perfect mind: But if it appear otherwise to such as are of disordered and perverse spirits, or have been so corrupted through an evil Education, that they have lost even common sense, and all natural Nations, it doth not in the least weaken the authority of this Law, no more than it would excuse, That Honey is not sweet, because it doth not seem so to such as are fickle, or of disordered Passions. Not much diferente from this is that of Plutarch in the life of Pompey, There is not, nor ever was, any man, by Nature wild and uncouth; many have indeed been made so by accustoming themselves to live like Beasts, beyond the bounds of Nature's Laws; and yet even these, by changing their manner of life, or the place of their abode, are easily reduced to become gentle, and sociable. And therefore Aritotle in the description that he gives of man, makes this as it were his proper pallion, That he is by Nature a Creature mild and tractable, Especially if we judge of him, according to that general rule, that the fame Aritotle lays down, Quid naturale fo, quod tandem in his qua bene seendum naturali non habens, non in depravatis, Pol. i. 1. 5. 3. What is the true nature of any thing, is best known by those that are perfect in their own kind, and not by those that are depraved and corrupted. For if we steer our judgments by this Rule, we cannot but acknowledge man to be in his own nature, the most meek, gentle, and peaceable creature of all others: as having nothing, by nature given him, whereby either to offend others or to defend himself: Besides as Nature hath made him the gentleman of all other living Creatures; So (as Philo observes) hath she made him sociable, not greedy of Society, and hath also fitted him thereunto by giving him that excellent Ornament of Speech, whereby with his Passions, though never so fierce and raging, are suddenly, as if by some spell or incantation, tamed.

Another species of jus, as taken for a Law, there is, which we call voluntary, because it is derived from the will; which is either Divine or humane.

We shall begin with that which is humane; because it is more generally known, and this is either Civil, or that which is more extended, or that which is more contracted than Civil. The Civil Law is that which arises from the Civil power. The Civil power is that which governs any City: Now a City is a compleat company of free-men, associated for the defence of their own Rights, and for their common profit. That Law that is of lesser extent, and ariseth not from the Civil Power, though subject unto it, is various, comprehending under it that of a Father over his Children, that of a Master over his Servants, and the like. That Law which is more extensive than that which is Civil, is that of Nations, which derives its authority from the joint consent of all, or, at least., of many Nations: I fly of many, because there is

X I V I I I .
Voluntary Laws.

X I V .
Humane Laws divided.
hardly any Law besides that of Nature (which also is usually called the Law of Nations) that is common to all Nations; yet oft-times that which is accounted the Law of Nations in one part of the world, in another is not, as we shall shew hereafter, when we treat of Captivity and Ptolomy. Now the Law of Nations is proved in the same manner as the unwritten Civil Law is, by continual use, and the testimony of men skilful in the Laws; and therefore Dio Chrysostome calls it the daughter of time and experience, and to this purpose are the Annals of former ages of human life.

The divine voluntary Law is that which is warranted by the express will of God, (as may be understood by the very word itself) whereby it is differentiated from the natural Law, which in some sense may be termed Divine also. And here that which was laid by Anaxarchus in Plutarch (though somewhat confusedly) may take place, namely, That God doth not will things because they are just; but things are therefore just, that is, rightly due, because he wills them. Now this Law was given by God either to all mankind, or to one Nation; to all mankind we find that God gave Laws thrice. First, Immediately after the Creation of man. Secondly, in the Reformation of mankind after the Flood; and Thirdly, in that more perfect reparation by Christ. These three Laws do doubtless oblige all mankind, as soon as, and as far forth, as men arrive at the knowledge of them.

X V. The Divine voluntary Law divided.

That this voluntary Divine Law was as obliging before the writing of it in books or Tables, as it was or is fence, is clear; for first, if the obliging power were only from the time when it was written by Moses, they that lived before Moses were no ways obliged by it, because till then it was not written. Secondly, then the obligation must needs extend it self to all the parts of the Law written, and to every circumstance of the Judicial Sabbath, as well as to the acknowledgment of the only true God. Neither is it sufficient to say, it was written unto the times of Adam and Noah, it being uncertain unto us now, whether there were no Ancient Record or not, much more, whether that which was written, were as the Tables of the Law, written by the finger of God. Dr. Hammond.

The Six Laws given by God to Adam and Noah, first, against slandering and false worship. Secondly that of bleffing the name of God, (that is, of adoring, invoking and praising God) Thirdly, that of judgment, (that is) of creating Magistrates and requiring administration of Justice. Fourthly, That of discovering Nakedness (i.e.) setting bounds to lust and prohibiting Marriages, within such degrees. Fifthly, That of shedding blood against Himself. Sixthly, That against Theft and Rape, and of doing to all as they would be done unto, are no where recorded in holy Writ, yet were they as obliging to the Jews as any of the written Laws of Moses; for we shall find themtouchd at Att. 14. 20. But to surety, that had it not been for those writings of the Jews that were not within their Canons, nor in ours; we of these times had never had known what that reference belonged. And as all the Laws that were given to Adam, Noah and the rest of the Patriarchs, although not committed to writing, nor traduced to us, yet left nothing of their obliging power to them, to whom they were given, so in the times of the New Law, although Christ revealed much of his Fathers will in Sermon, and other occasional discourses, very few whereof are written, and those that are, were not for written, until many years after his Resurrection; ye will no man say, that because they were not left written, therefore they did not oblige his Auditors.

XVI. The Law given to the Jews did not oblige strangers.

Psalm 147. 17.

Of all the Nations of the Earth there was but one to whom God vouchsafed to give Laws peculiar to themselves, which was that of the Jews: What Nation, faith Moses, so great to whom God hath given Statutes and judgements, so righteous, as this whole Law? Deut. 4. 7. So likewife David, The Lord hath showed his word into Jacob, his Statutes and ordinances unto his people: Non iacere genti aliis; He hath not done so to any Nation, neither have the Heathen knowledge of his Laws. Doubtless then tho' the Jews (and among them Tryphon himself in his defeqations against Judea) do groan, who, hold, That even Foreigners, if they would be laved, must submit to the yoke of the Moabical Law. For that Law binds none but those to whom it was given, and who those are, the Preface to the Law it self will plainly declare; Aud, Isracl; Hen O Israel, faith the Text: And every where we read, that the Covenant was made with them, and that they were chosen to be the peculiar people of God, which Maimonides acknowledges to be true, and proves it out of Deut. 33. 4. But even amongst the Jews, the callaways lived some Foreigners being holy men, and such as feared God, as the Syriacian Woman, Mat. 15. 22. Cornelius, Acts 10. 2. The Grecians mentioned Acts 18. 4. whom they called the pious among the Gentiles; such as were termed strangers, Lev. 22. 25, and a Sojourner, Lev. 25. 47. whom the Chaldee Paraphrast calls an inhabitant that is uncircumcised, whereof we may read, Exod. 12. 45. who was distinguished from a Proflyete; who, though a Foreigner, yet was circumcised, as appears by comparing this place with that of Numbers 9. 14. These uncircumcised Sojourners Maimonides admit may be partakers of the blessings of the life to come. St. Chrysostome upon the second to the Romans, where St. Paul mentions the Jew, and Gentile, writes thus: What Jew, and what Gentile doth St. Paul here mean? surely thys, faith he, that lived before Chrift, as Job, the Ninevites, Melchisedek, Cornelius, &c. And what Gracians doth be discourse of? Surely not such as were idolaters, but such as worshipped God according to the Law of Nature, who setting aside the Jewish Ceremonies religiously observed all things that appertained to an holy life. And again, The Gracian he calls, not him that worshipped idols, but him that was pious and devout, though he be submitted not to the Jewish Rites. And thus likewise doth he expound that of St. Paul: To him that is without Law, as being free from the Law. And in another place,
A Greek he calls not him, that was given to Idols, but him that invoked the true God, and yet observed not the Jewish Ceremonies, as their Sabbath, their Circumcision, their oblations and the like; but yet endeavoured to please the whole course of his life, according to the Rules of wisdom and true piety. Now there, as the Hebrew Doctors themselves testify, were bound to live in conformity to the Laws given to Adam and Noah, abstaining from Idols and Blood, and from other things hereafter express, but not to the Laws peculiar to the Jews; and therefore, whereas it was not lawful for the Jews to eat the flesh of any thing that dyed of it self, yet it was lawful for the stranger living among them to do so. Deut. 14. 21. unless it were to some particular Laws wherein it was expressly provided that as well the stranger as the home born was bound to observe them. For we read that it was lawful to the stranger, that never submitted to the Moral Law, to worship God even in the Temple at Jerusalem; yet so, that he flood in a particular place by himself, separate from that of the Hebrews, as you may read 1 Kings 8. 41. Jo. 12. 20. Acts. 8. 27. Neither did Ephes join Naaman, nor James the Just, nor Daniel Nebuchadnezzar, nor the other Prophets persuade the Syrians, Moabites, or Egyptians, unto whom they wrote, that there was any necessity at all for them to submit to the yoke of the Jewish Law. And what I say here of the whole Law is true also of Circumcision, which was as it were, the introduction unto it, with this only difference, That to the whole Law of Moses, the Israelites only were bound, but to that of Circumcision all the posterity of Abraham: And from hence it was, that the Ishmaelites being the offspring of Esau, Ishmael, or Jerura, were compelled by the Israelites to be circumcised as both the Jewish, and Grecian Historians inform us. Besides of all other Nations, that of St. Paul holds true. Seeing that the Gentiles who have not the Law, do by Nature, the things of the Law; (that is, by their own manners and Customs, flowing from the original fountain of reason) (unless any man had rather refer the word, Nature, to the words foregoing, thereby opposing the Gentiles to the Jews, who as soon as they were born had their Law inscribed in them), these having not the Law, are a Law unto themselves, as being the work of the Law written in their hearts, their thoughts and Conferences mutually occurring or existing in themselves. And that also in the 26th verse of the same Chapter, If the un circumcision keep the Law, shall not his uncircumcision be accounted for Circumcision. Thus doth Chrysostom expound that place of St. Paul before cited, The Gentiles by Nature, that is, by the very Dollices of Right reason: And presently after in this, faith he, are they to be admired, That they flood in need of the Law to guide them. And that instead thereof, they were governed only by the use of reason and the light of their own Consciences. Thus also doth Tertullian argue against the Jews of his age; Long, faith he, before Moses wrote the Law in the Tables of Stone, there was (as I will justify) a Law naturally understood and observed by the Patriarchs. And therefore Ananias the Jew in Josephus did rightly inform Jaces Adiabenus, That God might be duly worshipped and well pleased with us, Although we were not circumcised. And Titus himself grants this to Titus, That there was some hopes left him of a better condition, though he did perfift in the way of his own Philosophy. Now the reason why so many strangers among the Jews were circumcised, and thereby obliged to keep the Law, (as St. Paul expounds it) were, partly that they might partake of the privileges of the Jewish Commonwealth, for Professors enjoyed the same Rights with the Israelites, as may be gathered out of Numbers 15. and is plainly asserted Exod. 12. 27. And partly, that thereby they might be made capable of those Promises which were not common to all Nations, but peculiar to the Jews only: Although I cannot deny but that there grew up afterwards an erroneous opinion, affiriming that without the pale of the Jewish Church there could be no Salvation. From hence then we may collect, that we Gentiles stand obliged to no part of the Mosaical Law, as a Law properly so called, because all obligation beyond that which arises from the Law of Nature, is derived from the will of the Lawgiver. But that it was the will of God, that any other Nation besides the Jews should be bound by that Law, cannot be made out by any solid arguments; we need not therefore, as to our selves, prove the abrogation of that Law, because it cannot be said to be abrogated as to them, whom it never bound: yea even to the Jews themselves the obliging power was abolished, as to the Ceremonial Law, as soon as the Evangelical Law began to be promulgated, which was plainly revealed to St. Peter, Acts 10. 15. And as to the rest, after that people ceased to be a people by the destruction of their City, and that general defeation that succeeded, without any hopes of restitution; but we who are strangers are not freede from that Law, by the advent of Christ; but by Christ we who before had nothing but a faint and obscure hope, placed only in the goodnes of God, are now strengthened by a clear and firm Covenant, alluring us that we also may grow up together with the Jews, (being the sons of the Patriarchs) into one Church, the Judicial Law, (which was that Partition-wall that kept us asunder) being now taken away, as St. Paul testified to the Ephesians.

Since
Since the Mosaic Law cannot directly oblige us (as hath been already proved) let us now see of what other use it will be to us, as well in this case of War, as in the like doubtful cases; the knowledge of this being very necessary for the clearing of diverse cases: For in the first place, from hence we may be assured, that what was heretofore commanded in that Law, is not repugnant to the Law of Nature. For since the Law of Nature is (as I have already said) perpetual, and immutable, nothing can be commanded us by God contrary to this Law, because God can never be unjust. Besides the Law of Moses is (as the Plaidsmith speaks) pure and right, and as the Apostle faith, Holy just and good; which places are to be understood of the precepts of the Law only. But as to the precepts of the Law we must speak of them more distinctly: Now legal permission (for that which respects the bare fact and signifies the removal of impediments only, I shall not here meddle with) is either full and perfect, which gives us a right to do something altogether lawfully; or less full and imperfect, which gives us only an impunity with men, and a Right that no man shall give us any lawful lett, or impediment in the doing of it. Concerning the former of these, the same may be said as is of positive precepts, namely, That what the Law thus permits, cannot be contrary to the Law of Nature, but of what is permitted in the latter sense, the case may be otherwise: but this collection takes place very rarely. Because where the words permitting are ambiguous, it is much more convenient for us to judge of whether of these two Permissions, it is to be understood by the Law of Nature, than by arguing from the manner of the permission. To proceed to the Judge of the Law of Nature: In the next place, Sovereign Princes, being Christians, may frame their Laws according to those of Moses, unless it appear, that those Laws were such as did wholly relate either to the coming of Christ, or to the Evangelical Law not then revealed; or that such Laws are contrary to what Christ did, either in general, or particularly, command. For excepting these three cases, no other can be imagined, why what is commanded by Moses should now be unlawful. Again we may hence learn, that whatsoever was enjoined by Moses, which may serve to the improvement of those virtues which Christ excited from his Disciples, ought now to be as strictly (if not more) observed by us than herefore it was by them: The reason whereof is this, because what virtues ever Christ requires of us, as humility, patience, love, &c. are to be performed in an higher degree, than they were under the state of the Jewish Law: And not without good reason, because of those Celestial promises that are held forth unto us in the Gospel, which are more clear than under the Law. Our Christian liberty, faith, Torment, is no way injurious unto innocence, for the whole Law as to piety, truth, confidence, chastity, justice, mercy, benevolence, and modesty, stands yet unrepealed. Nay, a larger proportion of these (faith Christ's most) is expected from us, because the graces of the Spirit are more plentifully poured down upon us, than they were upon them. And hence also tells us, That Christ makes the precepts of the Law take of a larger extent than Moses did: For his said only Thou shalt not kill; but Christ saith, Thou shalt not be angry unadvisedly: Moses said, Thou shalt not commit Adultery, but Christ saith, Thou shalt not look to lust after a woman. And therefore the Old Law in comparison to the New is said to be weak, and not without blemish. And Christ is said to be the end of the Law. But the Law, our School Misriff, or our guide to lead us into Christ, Gal. 3, 25. So the Law of the Sabbath, and that of Titles, do oblige us Christians, not to yield a lesser proportion of time for the worship of God, than a seventh day, nor a lesser proportion of the fruits of the Earth for the Priests Alimony, and other the like sacred uses, than the tenth part.
CHAP. II.

Whether it be lawful at any time to make War.

I. That to make War, is not repugnant to the Law of Nature, proved by reason.

II. By Histories.

III. By consent.

IV. That it is not repugnant to the Law of Nations.

V. That the voluntary Divine Law, before Christ, was not against it, proved; and the objections to the contrary, answered.

VI. Certain precautions concerning this question: whether War be repugnant to the Law of the Gospel?

VII. Arguments for the negative opinion out of the holy Scriptures.

VIII. The arguments out of Scripture for the affirmative, answered.

IX. The confession of the primitive Christians concerning this, examined.

Having thus taken a view of the springs from whence all Rights flow, let us now begin with the most general question, Whether any War be just, or whether it be lawful at any time to make War? But this very question with others that follow are to be decided in the first place by the Law of Nature. Cicero in several places very learnedly proves, out of the books of some Stoicks, that there are some principles inlipp'd into us by Nature her self, as soon as we are born; as to love our selves, and to hold nothing dearer unto us, than our selves; and in order to the conservation of that being, that she hath given us, to love and rejoice in those things which conduct to the safety of the whole body, and of every member thereof: and to abhor those things that tend to its deftruction. Hence it comes, that there is no man but being left to his own choice, had rather that all his members should be proportionable and entire, than by woe broken or crooked. Therefore our first duty (according to Natures instinct) is to desire those things most, that are most agreeable to our own Nature, and to avoid those things that are destructive unto it. But these things thus known, and reason beginning to sprout forth from her latent seeds, then our second duty is to follow such things as are agreeable to reason itself; which is ever more to be preferred before those that are convenient to the body; and consequently to embrace those things that accord with justice and honesty, rather than those whereunto we are led by sense and appetite; because the Principles of our Nature do recommend to us right reason, as to our best guide, and preceptor. As for Nature in all other things never produced her best and choicest fruits, until she arrives at maturity; so neither hath humane nature her self produce her best operations, until reason grow up to perfection. And therefore should Reason itself be much dearer unto us, than those things whereby we arrive unto it. Now these things being undeniably true, and without any farther demonstration by all men of sound judgment granted; it follows that in examining the Law of Nature, we find out, what is agreeable to those beginnings or first principles of Nature; and then that we proceed to that, which though in order of time later, yet is much more worthy to be followed; and that not as accepted only, if it may be granted; but as that, which by all means is to be required. Moreover that which we call, reason, according to the diversity of the matter, is sometimes taken strictly, so as to confine (as may say) in a very point, from which if a man deviate on either side, he falls into vice; and some times largely, for that which may be commendably done, and yet blamelessly either left undone, or done otherwise. Now concerning things honest in this latter sense, are all Laws, both divine and humane, converfant, making those things due Debits, which of themselves are commendable only. Above, when we treated of the Law of Nature, it was questioned whether any thing might be done, not unjustly: But that we understand, it was not unjust, which had a necessary repugnancy to rational and social Nature. Now amongst the first principles of Nature we do not find any thing repugnant to War; nor all things seem highly to favour it, for both the ends of War (being the conservation both of our lives and Limbs, and the acquiring or retaining of what doth necessarily conduce thereunto) are most agreeable to Natural instinct. And to do this by force, if necessity require it, is a like natural; for why else hath nature given unto every creature strength, to help and to defend itself? All forts of Animals, faith Xenophon, are expert in some kind of War, having no other instrument but Nature.
Each, both its enemy, and preserver knows;  
The weapons given, and how to use them shews.

So likewise Horace:

Who taught the Wolf to bite, the Oxe to gore,  
The Horse to kick? all’s set on Natures score.

But Lucretius yet more fully:

All beasts, their power to hurt, full well can tell;  
Calves, ere they sprout, knowing where their Horns should dwell;  
With angry Brows, their urging foes repel.

To the like purpose is that of Martial:

The Calfe with unborn brows to fight prepares.

Every living creature, faith Porphyry, is taught by Nature wherein its strength, and wherein its weaknesst lies; and accordingly to expose the one, to defend the other: the Libard makes use of his teeth, the Lyon of his claws and teeth; the Horse defends himself with his Hoofes, and the Oxe with his Horns. Wherewith accords that of Galen. We see every living creature making use of that part for its own defence, wherein it conceives it self strongest: the young Calf will kick with his Hoof before they be hardened: and the Calfe threaten with its head, though it have no Horns. And in his book of the use of the members, he tells us, That man is a creature, fitted by Nature either for War, or peace; for although he be born unarmed, yet hath Nature given him hands apt to provide, and to make use of Arms: which Infants, we see, do of their own accord without instruction. It was well observed of St. Chrysostome, That to all Creatures who want the use of reason, Nature hath affixed Arms to their bodies, as to the Oxe horns, to the Bear Tinks, to the Lyon claws: But to me, faith he, hath God affixed Arms not affix to my body, but without it, hereby show- ing that he intended man for a gentle creature, and that it was not lawful for me at all times to make use of such Arms. For as I often lay them aside, so I sometimes assume them, that therefore I may be the more free and at liberty, and not always compelld to go armed; God though he hath given me Arms, yet hath placed them without me. Aristote also tells us, That hands were given unto man instead of a Sword, a Spear, or any other weapon, because he can thereby make use of all. Hence then we may conclude, That in the first principles of Nature, there is nothing that is repugnant to War. But if we will examine the Lawfulness of War by right reason, and the Nature of humane Society, which is the second and most perfect rule to judge by; we shall plainly perceive that all manner of force is not thereby forbidden, but that only which is repugnant to humane Society, that is, which invades another mans Right: for the main end whereunto such Societies were at first entred into, was that the whole should engage it self, that each part thereof should freely enjoy its own, which without much difficulty may be presumed to have been in force; although that which we now call Dominion had not been introduced. Because our lives, our limbs, and our liberties, had even then been our own, and could not without manifest injury have been invaded, or taken from us. So likewise, to have made use of such things as were then in common, and to have confounded as much of them, as was necessary to sustain Nature, had been even then the right of the Occupant. But since Dominion hath been either by Law, or custom establisht, this is much easier to be admitted and understood, which I shall take leave to exprefs in Cicero’s own words: To purloin from another that which is his, or to enrich our selves by the spoil of others, is more repugnant to Nature, than usursps, poverty, imprisonment, banishment, yea than death it self: For it dissolves that Contagion that there is, or should be between mankind’s: for if this be admitted, it must necessarily disjoin, and break in pieces, that sweet concivision that there is between man and mankind which nothing can be more agreeable to humane Nature. If every member of the body should be poffeft with this opinion, That it should enjoy better health, if it could attract unto it self the nourishment of the member next unto it, and should therefore do it, would not the whole body languish presently and die? So if it were permitted that what one man savest, another should reap, that what one man planted, another should receive the fruits of, or that one man should enrich himself by the spoils of another, it is impossible that sociey should long stand. For as it is most natural for evry man to love himself best, and to feed and support himself rather than another, with what
his own; so there can be nothing more unnatural, or absorbing from right reason, than for a man to take away from his neighbour that wherewith he should sustain himself; or to improve his own Estate by the ruin of his neighbours. Neither is this more agreeable to the Laws of Nature and Nations, than it is to the municipal Laws of every City; for to this point do they all, at this they chiefly collude, this they all of them frantically command and enjoy. That every member of that Society should freely enjoy his own without fear or disturbance: For by this means is that excellent conjunction and Confederation between them preserved sound and native. And be that willingly breaking this Golden Chain of humane Society, is by the general consent and adoption of all people, adjudged as unworthy of humane Society; and therefore like some nations heath is deferredly projected to Banishment, bonds, imprisonment, and even to death itself. This then being agreeable to the Laws of Nature, and Nations, and being the end of all municipal Laws, must needs be the Discharge of right reason, and so the voice of God himself; whereunto whoever willingly conforms himself, will certainly so moderate his desires, that he will never exact what is not his own; nor either by force or fraud impose anything for his own private gain; than which nothing can be more unnatural, nothing more reprehensible, nothing more destructive to humane Society. Neither is it against the Nature of humane Society, for a man to provide for himself so as he do not damnifie his Neighbour; and by consequence that force which doth not violate another mans right is not unjust: which the fame Cicero thus expresseth, Since there are but two sorts of decensions, the one by argument, the other by plain force: the former being proper to men, the other to beasts, we ought to make the latter our refuge, when by the former we cannot prevail. And in another place, Quod eft, quod contra voluim fieri est ratio? What remedy can we have against force, but by force? So Ulpian, To repel force with force, it is a right that Nature ordains for all creatures.

Arms against Arms, all Nations do allow.

What I have already laid down, namely, that it is not every War that is repugnant to the Law of Nature, may be farther justified out of the Sacred Story. For God by his High-Priest Melchisheca, did approve of the War made by Abraham, and his Confederates, upon those four Kings that came to plunder Sodom. Yead Melchisheca blest God for the Victory; Blessed, faith he, be the most high God who hath delivered thine enemies into thine hand, Gen. 14. 20. And yet had Abraham no special Communion from God for it; but was excited and persuaded thereunto by the mere Law of Nature, being himself a man not only exceedingly holy, but very wise, according to the Testimony that Brevatur and Orpheus give of him. The War made by the Israelites upon the seven Nations whom God delivered up unto them, I purposely omit; because they had a special warrant from God to make War upon that people, who had highly provoked him: and therefore those Wars are in holy Writ called The Wars of the Lord, being undertaken by Divine not humane authority. More to our purpose was that War made by the Israelites under the conduct of Moses and Joshua against the Amalegetis, who had forceably oppossed them in their passage towards Canaan; which though it was not commanded to be done, yet being done was approved of by God, Exod. 17. Nay farther God himself prescribed unto Moses certain general and laying Rules and Ordinances how he should make War, whereby he sufficiently testified, That War might sometimes be just, though we have no special command from God to make this or that War; for there Moses makes a manifest difference between the case of the seven Nations, and the case of other people: For these they might receive to mercy, but not them. And seeing he doth not prescribe, for what particular causes they might make a just War, it may reasonably be presumed, that those causes may cally be determined by the very light of Nature; such was the cause of the War that Jehovah made against the Ammonites, for the defence of their boundaries, Judg. 11. And that which David was enforced upon, against those who had violated the rights of his Ambassadors, 2 Sam. 10. And it is worthy to be observed what the Author to the Hebrews records, concerning those pious Heroes, Gideon, Baruch, Sampson, Jehovah, David, Samuel, &c. That by faith, they subdued Kingdoms, and put whole Armies of the aliens to flight, Heb. 11. 34. Where under the notion of faith, is included a full allowance they had, that what they then did, was acceptable to God. And upon this presumption also it was, that David is said, by a woman wife, to fight the Lords battle, and made a pious and just War, which could not be if all manner of War had been utterly unlawful. To the authority of Sacred Story, we may add for greater confirmation, the universal consent of all, or at least, of the wisest of all Nations, concerning that force whereby our lives are defended. Cicero gives the Testimony of Nature itself, Eft hae, non scripsit honesta lex; This, faith he, is no written Law, but a Law that is born with us, that

Whether it be lawful at any time to make War. BOOK I.

if our lives be endangered, either through force, or Treachery; all means we can use for our safety are just and honest. And again, This, the learned are taught by reason; the unlearned by necessity; the Nations by custom, and the very beasts themselves by natural instinct, to repel by all means whatsoever, all force and violence that shall be offered us whereby our bodies, our members, or our lives shall be endangered. So Cajus the Lawyer, Against all innumerable dangers, natural reason teacheth us to defend our selves. And Florimonts, Whatever any man doth in his own defence is just and lawful. Josephus also informs us, That to preserve life is a Law that Nature her self hath imprinted in all living Creatures. And for this cause it is, that they who endeavour to spoil us of our lives, are justly accounted our enemies. Which indeed batin so much of natural equity, that even amongst beasts, who (as I have said already) have nothing of Justice or Law among them, more than a faint shadow or resemblance of it, we distinguish between that beast, which of his own accord afflicts us, and that which afflicts us in its own defence. And Upian notwithstanding that he had said before, That Beasts wanting the use of reason, could not be taught properly to do wrong; yet he presently subjoyns, that when Rams or Bulls fight and kill each other, by the Law of Qu. Naturae, they were to distinguish between them, so, that if he perished, that was the aggressor, the action was null; but if he perished, that was provoked, the action was good. The ground of which Law is set down by Pliny, Because, faith he, there is no sensible Creature, but what is impatient of an injury, and being assaulted, will assaile again. For as he well observeth, Lyons will not prey upon Lyons, nor Serpents bite or sting Serpents; yet if any violence be offered them, there are none but will express somewhat that it like unto anger: none so stupid, but being hurt, will to his utmost power defend himself, so that in all causes that which is offensive is the most just, because Nature poteat efficere nostra, quam adversaria perniciem.* Our own preservation is more agreeable to Nature, than the destruction of an enemy.

By the Law of Nature then, (which may likewise be called the Law of Nations) it is evident, that all War is not to be condemned; nor yet by the voluntary Law of Nations, as Hostilities will sufficiently instruct us, wherein the Laws, Customs, and manners of all people are faithfully recorded. Nay by the very Law of Nations were Wars introduced, faith Hermogenianus; so he that wrote the lives of men, famous in their several ages, in that of the life of Themistocles, tells us, That he acknowledged that it was by his advice, that the Athenians surrounded their City with Walls; which notwithstanding by the common right of all Nations they might do, whereby to defend their publick and private Gods from the fury of their enemies. Yet whereas I said before, that by the Law of Nations War was at the first introduced, the words will as I conceive, admit of a better fenfe, than what at the first view they seem to import; as namely, that there are some certain forms and Ceremonies introduced by the Law of Nations, which by the consent of Nations do give such and such peculiar effects to such Wars as have them: whence ariseth that distinction whereof we shall hereafter make use; between a War that is solemn by the Law of Nations (which also is said to be just, that is, full and absolute) and a War that is not solemn, yet ceaseth not therefore to be just, that is, congruous to Right: for even other Wars (so as the cause be good) the Law of Nations doth neither approve of, nor yet impugne, as shall be shewed more at large hereafter. It is ordained as a Law amongst all Nations, faith Livy, that Arms may be repelled with Arms. With whom agrees Florimonts. It is generally contended unto by all Nations, that we may freely drive away all violence and wrongs offered unto us, whereby our lives are endangered. Which justifies all Wars that are merely defensive; for as much as Nature is much better pleased with its own preservation, than with the destruction of enemies.

But the main question is, Whether it be agreeable to the divine voluntary Law to make War? And here if any shall object, that the Law of Nature being immutable, nothing can be decreed by God himself contrary to it. I answer, that this is true in such things as the Law of Nature doth expressly either command, or forbid: But not in such things as by the Law of Nature are only lawful, only, that is, tolerated; for such as these, because they belong not properly to the Law of Nature, but are without its jurisdiction, may be either commanded, or forbidden. The first objection that is brought out of the holy Scriptures against War, is that Law given to Noah and his posterity, Gen. 9. 5. 6. Where God speaks thus: Surely the blood of your lives will I require; at the hands of every beast will I require it; and at the hands of every man, at the hand of every mans brother will I require the life of man. Whoever sheddeth man's blood, by man shall his blood be shed: for in the image of God made he man. Some there are that would have the former words of requiring blood, understood in the largest fence; and the latter words of shedding blood, they would have to be a combination, and not an approbation; but I like neither. For the prohibition to shed blood is of no larger extent, than that in the Moral Law, Thou shalt not kill: which doth neither prohibit a Magistrate,
Whether it be lawful at any time to make War.

That Phalaris should be tormented in his own Bull, Thus be that intended mischief to another, should suffer the same mischief from another, is justissima patenti a norma, as Senex speaks; The most equal rule of suffering that can be ordained. Out of a deep fence of this natural Equity it was, that Cain (his hands yet reeking in his brothers blood) paid this sentence upon himself; And it shall come to pass, that whatsoever finds me, shall kill me. But God in Gen. 4. 14. forbid this infamy of the world, which to all intent of the Kacity of men, or because this sin was barely practiced, and so the laws need of exemplary punishments to deter them, did by an Edict repres that which seemed naturally to have been lawful, and adjudged the Homicide to wander as a vagabond, forbidding all men to have any commerce, or to make any contract with him, yet would he not have his life taken from him. Thus also did Platæ ordain among his Laws; and that this punishment was much used among the ancient Greeks, Euripides testifies in these words:

How wisely did our Ancestors decree,
That he that guilty was of blood, should flee
Far from Commerce, or fight of men, that be
Punish'd by flight, rather than death, might be?

To the same purpose is that of Thucydides: It is very probable that anciently Small punishments were awarded to great crimes; but at length those being lighted, they proceeded to death. Servius upon the first book of Virgil, delivering upon their two words, Sestius, Lucrius, faith: That those words were derived from the payment of money, Antiquarum erat pecuniae pecuniae suave: For among the Ancients all punishments were pecuniary. The like we find in Lucianus, Hitherto it was accounted impious to put men to death, though never so wicked; grounding their conjecture upon that one notable example of Cain, That it was not the will of God that Homicide should be so punished, whereupon it grew at length into a Law; so that Lamech not long after having committed the like sin (or rather (if he did commit the like) for Moses his words will bear this fence) yet by this one example promised to himself the fame impunity, Gen. 4. 24. Nevertheless, though before the Flood, in the age of the Giants, though the remembrances of punishments men grew savage and outrageous, killing each other like beasts; yet when after the flood, the earth was fully flocks with men, left the fame licence should again increase, God thought fit to restrain it by a more severe punishment: So that correcting the impiety of the former age, what nature before judged not unjust, he himself permitted to be done, namely, that he that sheds mans blood, should himself be put to death, and that he that killed an Homicide, should be held innocent. But afterwards Tribunals being erected, this power for many weighty reasons was transferred to Judges only; yet so, that some prints of that ancient custom were to be seen, even after Moses his law was given (whereof more shall be said anon) as may appear by that right which was granted unto him that was next of kin unto him that had been slain. We have Abyrham's practice to justify this glo's, who though he very well knew the Law that God gave unto Noah, Gen. 9. 6. yet took Arms against the four Kings, presuming on that principle of Nature, that to destroy the destroyer, was not opplicating to the God of Nature: Thus Moses commanded the Israelites to fight the Amalekites, who with Arms opposed their paffle into Canaan, having no other warrant for so doing, than the bare Law of Nature: For it appears not that in this, as in other like cases, he confulted with God at all, Exod. 17. 9. Exod. 17. 9. Whereunto we may likewise add, that Capital punishments were executed not against mothers only, but against other great crimes; and that not amongst the Gentiles only, but even among the Patriarchs, as the story of Jafob and Thamar doth clearly evince, Gen. 38. 14. rationably conjecturing by an Argument drawn from like to like, that it was agreeable to Gods will, that the punishment ordained against Homicides, might justly be inflicted on such as were notoriously criminous. For some things there are that we equally value,
value, as we do our lives, such are our Honour, our Virgin Chastity, our Matrimonial Faith, and such things without which our lives cannot be well secured; as our reverence to our Prince, without which no society can be preserved. Now they that offend against any of these, are no better than Homicides, and are therefore to be equally punished with them. Hence anathet that ancient Tradition among the Hebrews, that God gave more laws to Noah than were recorded by Moses, who thought it sufficient to inflict among those laws which God gave to the Hebrews by himself. Incefulous Marriages were among those things commanded by God to the Sons of Noah, they reckon this, that not only Murder, but Adultery, Incest, and violent Rapes were to be punished with death, which seems to be confirmed as well by the story of Abimelech, Gen. 20. 6. as by the words of holy Job, Job 31. 1. But the law given by Moses adds the reasons of these Capital punishments which were no less in force among the Gentiles, than among his own people, as it is most apparent, Lev. 18, 24, 25, and the 27, and 28. verse. And elsewhere he tells us, that the Land being defiled with blood, could not be cleansed but by the blood of him that shed it, Num. 35. 31, 33. And it were unreasonable to think, that God should indulge this favour to the Jews only, that they might defend themselves by war and punish malefactors with death, and at the same time forbid it to other Nations: Neither doth it appear that the Prophets were at any time sent by God, to admonish or reprove either Kings or People for either infringing Capital punishments on Malefactors, or for undertaking a war, merely, as war, as they were to reprove other sins. But on the contrary, who would not think but that seeing Moses' judicial laws were observed to carry the ramp of the divine Law, those Nations did wisely and piously, who formed their laws according to that original? As questionless the Greeks, especially the Atticks did, and from them the Romans in their Laws of the twelve Tables. But let this suffice to prove that the laws of Noah are not to be understood as they conceive, who by them would evince all wars to be unlawful.

But much more specious are those Arguments which are drawn out of the New Testament against war: In the examination whereof I shall not take that as granted which some do, that there is nothing in the New Testament commanded (except matters of Faith and the Sacraments) but what is commanded by the Law of Nature: For this, in that sense wherein they take it, I cannot admit it. But this I willingly grant, that there is nothing commanded in the Gospel but what is naturally honest: But that the laws of Christ do not oblige us further than to what the Law of Nature doth by itself bind us, I see no reason why I should admit: And for them that approve of this opinion, it is a wonder to see what pains they take to prove that Polygamy, Divorce, Fornication, which we find forbidden in the New Testament, were by the law of Nature unlawful. Hence is that of St. Jerome, Alii sunt leges Caesaris, alii Christi, alii Papinianus, alii Paulus scriptor: The laws of Caesar are one, and the Laws of Christ another, it is one thing that Papinian prescribes unto us, and another what St. Paul commands. 'Tis true, these are such as right reason tells us, to abstain from, is more agreeable to the rules of honesty; but not such as are in themselves impious, but only as they are by the Divine Law forbidden. But as to that which the Christian Law enjoins us, namely, That we should lay down our lives one for another, who can say that we are obliged thereunto by the Law of Nature? It is for those that do not yet believe the Gospel, to be guided by the Law of Nature, faith Titian Martyr, of which opinion likewise was Origen. Neither can I allent unto those who hold that Christ in his Sermon on the Mount, did only interpret, and (as it were) embowel the Law of Moses: For tho' words so often repeated, (Ye have heard that it hath been said to them of old; But I say unto you:) do plainly signify another thing, yea and the Synagogues and other Translations do clearly shew, that by vobis is understood not by, but to them of old; as in the opposite word, vobis, is not meant by, but to you. But those of old were none other, but such as lived in Moses his time, and those layings that are there rehearsed, as spoken to them of old, were meant as spoken by Moses himself, not by the Lawyers either in the same words, or to that sense; as Thou shalt not kill, what soever killeth shall be in danger of judgment; Thou shalt not commit adultery, whosoever shal put away his Wife, let him give her Writing of Divorcement; Thou shalt not forsake thy self, thou shalt perform unto the Lord thine oaths: An eye for an eye, and a tooth for a tooth, (that is, thou mayest exact this in judgment) so thou shalt love thy Neighbour (that is an Israelite) and hate thine enemy; that is, those seven Nations with whom they were forbidden to contract friendship, or to whom they ought to shew no mercy; unto whom we may add the Amalekites, with whom they were bound to have a perpetual war, Deut. 25. 19. Now the better to understand the words of Christ, we must necessarily understand that the
the Law given by Moses will admit of a twofold construction, either in such a sense, as is common with all humane Laws, namely as it restrains men from gross sins by the fear of publick punishments, Heb. 2. 2. And so it was given by Moses to restrain the Hebrews in the state of a Civil Government, Heb. 7. 16. Where it is called the Law of a carnal Commandment, as it is also in another place called the Law of Works, Rom. 3. 27. Or it is taken in a sense more proper to a Divine Law, namely, as it requires all the purity of the mind, and such duties, the omission whereof, no humane laws do punish. In which sense, it is called a spiritual Law, Rom. 7. 14. Containing the soul, Phil. 19. 9. (which the Latins make the 18th.) The Pharisees and Lawyers contending with themselves with the Carnal part of the Law, wholly neglected the spiritual as superfluous; and therefore never instructed the people therein, as not our own writers only, but Josephus and many of their own Doctors do tell us against them. But as to the spiritual part also we must know, That those virtues which are required from us Christians, were either commanded or commended unto the Hebrews also, although not in that degree and Latitude, as they are unto us, which we have already proved. For a more perfect and exact obedience is now required from us, than was formerly from the Jews; because the coming of Christ doth heighten our hopes, by far more precious promises. And the graces of his spirit which descended unto them but as a little dew upon the Herbs, falls on us as showers on the Grass. Under the Law God did not bind us up to so great a measure of virtue as he now doth under the Gospel; then it was permitted to take some revenge for injuries done, as to revile them that reviled us: we might exact an eye for an eye, a tooth for a tooth; it was then permitted unto us to swear, though not to forswear, and to hate our enemies: It was not as yet forbidden to be angry, to put away a Wife that offended us, or to marry another: nor, nor to have diverses at the same time. Great was the indulgence of the Old Law in these and the like cases. But since the coming of Christ, the way to heaven is made much straiter, and narrower than before, both by the addition of many new precepts not given in the Old Law, and also by straining up those that were so given, to a much higher Key. Christ therefore oppofeth his own doctrine to the doctrine of the ancients, in both these senses; first because his own took not hold of the outward man only, to restrain it by pure negatives, as other Laws did; but restrained the inward man also obliging to positive duties, whose omission was not punishable by Moses his Law. But also in the second place because it enjoyned spiritual duties, in that height of degree, that neither Moses, nor any other Law-giver, did ever reach; whence it is plain, that what Christ delivered, was not a bare interpretation of Moses his Law, as some would have it. But yet that these things should be known, is not only pertinent to the matter in hand, but to many other purposes, left we should attribute greater authority to Moses his Law than indeed is fit or due unto it.

Omitting such arguments as are less convincing, the first and principal Testimony where: by it may easily be proved that all right of making War is not fully taken away by the Evangelical Law, is that of St. Paul to Timothy: I exhort you, faith St. Paul, that above all things, Prayers, and Invocations, Intercessions, and giving of thanks, be made for all men, for Kings and such as are in authority; that we may lead a quiet and peaceable life in all Godliness, and honesty, for this is good and acceptable in the sight of God our Saviour, who have made all men to be saved, and to come to the knowledge of the truth. From whence these three things are to be learned, first, that it is acceptable unto God that Kings be made Christians: Secondly, that being made so, yet they cate not to be Kings; Which Julius Martyr thus expressly, We pray, faith he, that Kings and Princes may together with their Royal Power, retain a sound and perfect mind. And this also in the third place we may learn, that Christian Kings should use their utmost endeavours, That other Christians may lead under them godly and Christian lives. But you will happily say, How? Surely the same Apostle explains himself elsewhere thus, He is the Minister of God for thy good, and if they do all then fear: Non enim frigida gladiator generit: For he beareth not the sword in vain, for he is God's Minister, an avenger to execute wrath upon them that do evil. Under the right of the Sword, is comprehended all manner of restraining or coercive authority, and so it is also sometimes understood by Lawyers; yet so, that the chief and principal part, that is, the true and proper use of the Sword is not excluded. The Second Psalm doth very much conduct to the understanding of this power, which Psalm, though verified of David, yet was much fuller and clearer understood of Christ, as we may collect out of Acts 4. 25. and Acts 13. 33. and out of Heb. 5. 5. Now that Psalm exhorts all Kings to kifs the Son of God with reverence, that is, to express themselves his servants as they are Kings; for so St. Aug. rightly expounds that place, whole very words as being pertinent to our purpose, found thus, Herein, faith he, do Kings serve God according to his command, as Kings, when they encourage virtue, and depress vice not only in things appertaining to humane Society, but in things appertaining also to the worship of God. And so in another place: How, faith he, do Kings serve the Lord in
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Ad Basij. Ep. 50.

in fear, unless it be in prohibiting, and by a Religious authority punishing all manner of impiety? For to serve God as a man, is one thing, but to serve him as a King is another. And a little after, Herein do Kings serve God, as Kings, when in need to his service, they do those things which none can do but Kings.

The second Argument, whereby we prove that all Wars are not unlawful, is drawn from that place of St Paul before cited in the 13th to the Romans, where it is said, That the highest powers, and such are thole of Kings, are ordained of God, and that power is therefore called Gods ordinance. From whence we infer the necessity of our subjection, together with that honour and reverence we owe unto them, and that, not so much out of fear, regarding the power they have to hurt, and punish; as out of Conscience, as it is Gods ordinance, and out of a strong persuasion, that in refisting it, we reft God himself. Now if the thing understood by the word, Ordinances, were only that which God permits, and will not hinder, as all actions that are vicious, then would there follow no obligation of honour or obedience, especially that extended to the Conscience; and therefore the Apostles whole Argument, would instantly fall to nothing, whose main scope was to extol this Regal power, which if wicked, he could never do, but by the fame Argument he might as well have commended Theft, and Robbery. It must necessarily follow then, that by this ordained power, we understand such a power, as God doth especially approve of; and then we may safely infer, That seeing God cannot will things contrary to himself, that this power is no ways repugnant to that will of God, which is revealed in the Gospel, and which obligeth all men to honour and obedience: neither doth it at all weaken the force of this Argument, That at that time, when St. Paul wrote, all Kings and Princes were strangers to the Christian Faith. For in the first place, this is not Universally true; for even at that time Sergius Paulus being Proprietor of Cyprus had given up his name to Christ long before, Acts. 13. 12. Besides, this dispute is not concerning persons, whether pious, or impious, but concerning the Kingly function, whether it be ordained of God, or usurped by men, which St. Paul seems here to determine, plainly alleging, That ordinance to be from God: and thereupon concludes, That it ought to be honoured and obeyed, and that, not outwardsly, only for fear, but even in the inward recesses of the mind, where God alone doth properly reign. Christiannity then doth not abolish Sovereignty; Nero and Agrippa, though they had received this faith, yet had still remained, the one an Emperor, the other a King; which necessarily infers the power of the Sword. For as under the Law, the Sacrifices were reputed holy, though offered by Hophni and Phineas, Priests unholy: so was the person be never so wicked: Saul was anointed King, as well as David.

A third Argument is drawn from the words of St. John the Baptist, who being demanded by the Jewish Souldiers, what they should do to flee from the Wrath to come, did not command them presently to lay down their Arms, and desert their calling, though they fought then under the Roman Banners, as in all probability they would have done, had it been contrary to the Christian Law to make War: but allowing their calling, he only labours to reform the abuses of it, exhorting them to abstain from acts of unlawful violence, and from false accusing, and to rest content with their wages, Luke. 3. 14. But here, some object, That there was so great a difference between the precepts of Christ, and the preceptions of the Baptist, that the Baptist seems to preach one Doctrine, and Christ another; but this we cannot admit, first because both of them declare the same end, and subsistence of the Doctrine they intended to preach, in the same words, Repent for the Kingdom of Heaven is at hand; to begins the Baptist, Matt. 3. 2. And to Christ, Matt. 4. 17. And Christ himself saith, The Kingdom of Heaven, that is, the new Law (for it is the manner of the Hebrews, to call their Law by the name of Kingdom) began to suffer violence from the dates of John the Baptist, Matt. 11. 12. John is said to preach repentance for the remission of sins, Mark. 1. 4. So did the Apostles in the name of Christ, Acts. 2. 38. John required fruits worthy of repentance, and threatened destruction to them that do not produce them, Matt. 3. 8, 10. He requires also works of Charity beyond the Law, Luke 3. 11. The Law also is said to continue till the days of John, that is, until the new and more perfect Law should have him begin, Matt. 11. 13. And for this cause it is that John is said to be Prophet major, Greater than the Prophet, Matt. 11. 9. Luk. 7. 26. And that he was sent to give knowledge of Salvation unto the people, Luk. 2. 77, and to preach the Gospel, Luk. 2. 18. Neither did John ever disdain to Jesus from himself, by any difference that there was in their Doctrines, (but only, thus, that what John declared generally and confusedly, was more distinctly delivered by Christ, who was the true light) but by this, That Jesus was the Messiah that was promised, the King of an heavenly Kingdom, who should give the power of the holy Ghost to those who should believe on him.

The
The Fourth Argument, and which seems to me of no small force is this. That if by the Gospel all power were taken away from the Magistrate to execute capital punishments, together with that of the Sword, to defend their Subjects from Thieves and Robbers; how soon would the Christian world be over-run with Rapin and violence, and what a Deluge of wickedness, of all sorts would break in upon us? That this must needs be the consequence, we shall easily grant; if we either remember what bad effects this reminiscence brought upon the old world; or if we do but observe, how hardly these sins of Rapin, Cruelty, and the like are restrained now, even by capital punishments: For the supposing whereof Tribunals, Laws, and so many kinds and degrees of punishments are invented, hath Chrysoll. in term ad Paterm. holden Wherefore if Christ had intended to have introduced a new, and never before heard of Form of Government; without doubt he would have declared it in such distinct terms, and in such a plain drefs of words, as should have been liable to no misappliccion: as, Let no man hereafter adjudge Maflesactors to death, Let no man take Arms to defend himself, or the like, which we no where read that ever he did: but whatsoever words are wrested from the Scriptures to this purpoze, are either very general, or very obscure. But equity itself, and common reason will instruct us thus much, That in publishing new Laws we are to restrain words too general, and to explain terms too ambiguous; and rather to decline a little from the common acception of the words, than to admit of such a fene of them, as may introduce so many miscarriages and inconveniences with it.

The Fifth Argument is this, That it cannot be concluded by any probable argument, that the Judicial Law of Mofes was ever abolished, till their City Jerusalem was burnt, and with it, not the formal only, but the very hopes of a Commonwealth did utterly vanish. For neither doth Mofes prefix any term or period to this Law, nor doth Christ or his Apotlies any where declare the furceasing of it; unless as it seems to be comprehended in the destruccion of the Commonwealth: yea rather on the contrary, St. Paul faith, That the High Priest was constituted, that he might judge according to the Law of Mofes, Acts, 24. 3. And Christ in the Preface to his precepts, Mat. 5. faith, That he came to fulfill the Law, and not to destroy it; which words if we refer to the Ceremonial Law, are not difficult to be understood: for when the Picture is finnished, what need we the fole draught? The Ceremonial Law was fulfilled in him, it circumscribing in Types and Signes, whereby the substance was Christ; and how could Christ be faid to fulfill the Judicial Law, if (as some hold) he took it away? And if the Jews were obliged by the Judicial Law, till the ditioll of their Commonwealth, it will follow, That the Jews, though Christi-anized, in cafe they had been called to be Magistrates, could neither have avoided it, nor have judged otherwise, than as Mofes had prescribed. I, truly, having throughly weighed all that can be faid, can find no ground at all, why any pious man shoule expound those words of Christ in any other fene: This I acknowledge, that many things were tolerated among the Jews before the coming of Christ, (whether as to outward impurity, or in respect of inward purity also, I fhall not now determine) which Christ would not permit in his Disciples, as for a man to put away his Wife for every offence, and for a man injured, to require revenge by way of Retaliation: but yet between Chrifls precepts, and Mofes his permiffion, there may be some difference, but no repugnance; for, under the Law, if a man did retain his Wife, or if he did remit revenge privately done, he could not be faid to break the Law, but to do that which the Law did chiefly require of him. But it is far otherwise in a Judge, whom the Law doth not permit, but enjoin to punish a Murderer with death; which if he do not, he himfelf fhall be found guilty before God. Now if Christ had commanded such a Judge, that he should not adjudge any Maflefactor to death, being contrary to Law, he had defioled, and not fulfilled it.

The Sixth Argument is drawn from Cornelius the Centurion, who received the Holy Ghost (an undeniable sign of Justification) from Christ himself, and was baptized into the name of Christ by St. Peter; yet we do no where read that he laid down his Commission, or that he was admoniflied by St. Peter to do. But some may fay, That being instructed by St. Peter in the Christian Religion, it may be prefumed, that at the fame time he did resolve to defer his calling: whereunto I answer, That if it could be any where found amongst the precepts of Christ, or infallibly proved, that Christ did formerly ordain, to make War, then what they fay were to the purpoze. But feeling no fuch precept is extant; certainly it is much more probable, that in this cafe of Cornelius, somewhat would have been laid against it, if it had been held unlawful, that so in after ages, men of that profession might not have pleased ignorance of the danger incident to that function. Neither is it likely that in cafe the Centurion had then renounced his Military profession, St. Luke would have omitted the recording of it, as usualiy he did in like cafes, as will appear by several places, but especially Acts 19. 19.

Arg. 4. An Argument drawn from the ill consequences that would follow.

Arg. 5. The same.

Arg. 6. From the example of Cornelius.
The Seventh Argument we deduce from *Sergius Paulus*, of whom after his conversion there is not the least mention made of his renouncing his Proprorship, or of any admonition given him by St. Paul to do it: that which is not recorded, (being most expedient to have been so) may be presumed not to have been done at all.

The Eighth Argument is drawn from the practice of St. Paul, who understanding that the Jews had laid wait to kill him, acquainted the chief Captain therewith, who sent him a strong guard of Souldiers to secure his person; which St. Paul did not refuse, nor did he admonish either the chief Captain, or the Souldiers, that it was not acceptable to God to repel force with force, which he had been apt enough to have done, had he believed it to have been unlawful.

The Ninth Argument is taken from St. Paul's precept for paying tribute for confidence sake, for of every thing that is honest and just, its proper end must needs be: now the proper end of paying tribute, is to maintain the power of the Sword, whereby the innocent are protected, and the noent corrected and cut off. But that we render unto Princes their Tribute due, is a precept of the new Law, and bindeth the Conscience, as St. Paul tells us of the Romans; therefore it follows, that by the precepts of Chrifiinity, the power of the Sword in the hands of the chief Magistrate is honest and just: very pertinent to this purpose, is that of Taciunt, *There can be no peace amongst Nations without Arms, no Arms without pay, nor pay without taxes*. So St. Aug. For this exaegely wetribute, that Souldiers may have their wages to buy necessaries.

The Tenth Argument is taken from St. Paul's speech, *Acts* 25. *If I have wronged any man, or if there be any point worthy of death, I refuse not to die*. So *Acts* 23. 18. *The Lord found no fault in death mine, faith St. Paul*. Whereas upon Jaffine Martyr, this glosseth: *If there be any amongst us that live not conformably to these precepts, being one in name Christians, that such should be punished, and that, by you, it our desire, as well as your. From whence we may collect, that it was St. Paul's opinion, even after the Gospel was published, that there were some crimes which in common equity deserved death: which very thing is granted by St. Peter also, *1 Pet. 2. 19, 20*. But if it had been Gods will that no Capital punishment should have been executed after Chrifts coming, St. Paul might have purged himself; but he thought it not convenient to inflin fuch principles into the minds of his hearers, as though it had not been as lawful then, as formerly, to punish Criminals with death; whereas he waveth this Plea, and submits to the ancient Law, *If I have done any thing worthy of death, I refuse not to die*. Now, having thus proved, that after the Chriftian Law was given, it was lawful to punish obtinare Malefactors with death; I take it to be sufficiently proved that it is Lawful for Princes to make War, namely against such a multitude of offenders, as shall by force of Arms infringe a Nation, who unless they be by force subdued will never acknowledge their own guilt. For though the power of these offenders, and their obtinate resolution may be a prudent condescension to perfuade Princes sometimes not to execute it; yet certainly, it diminisheth nothing of their right to punish.†

The laft Argument may be this, that the Chriftian Law did abrogate that Law of Moses only, that did separate the Gentiles from the Jews, *Eph. 2. 14*. But those things which have the reputation of being honest either by the Law of Nature, or by the unanimous consent of all Civilized Nations, the Chriftian Law is so far from taking away, that it comprehends them under that general precept of all honesty and virtue, *Phil. 4. 8. 1 Cor. 11. 14*. And as to the Capital punishments of Malefactors, and the repelling of injuries by force, these may be ranked among things laudable, and may well be referred unto those two excellent virtues, Justice and Benevolence. But here, on the by, we are not to omit the error of some, who wholly attribute the lawfulness of the Jewifh Wars against the seven Nations to the grant, that God made unto them long before of the Land of Canaan: whereas this, indeed, may be one, but not the only cause. For as before, as at the pollition of that Land, many pious and just men did make War, by the guidance of mere natural reason upon several other occasions. *As King David did, for the affronts offered unto his Ambassadors; neither are those things which every man enjoys by the right of humane Laws left his own, than that which is given him by God himself, nor is that right either laffened or taken away, by the Chriftian Law.*

Now by poising these arguments with those brought on the adverse part, the judicious may easily find whether of them are weighty. And in the first place, they urge that of Efay, *And it shall come to pass, that the people shall break their Swords into Plough-shares, and their Spears into pruning-hooks*. Nation shall not lift up Sword against Nation, neither shall they learn War any more. Which words of Esay, St. Chryfotome applies unto that universal peace that the world enjoyed under the Roman Empire; *Neither was it foreordained only, faith he, that this new Religion should be firm, stable and unbroken; but that thenceforth there should come peace to the whole earth*. But this Prophecy of Esay (as I take it) is
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Chap. II.

Whether it be unlawful, as many others are, as that such should be the state of affairs, in case all Nations should submit to the yoke of Christ, and live according to his Law, whereunto there shall nothing be defensible on God's part: for most certainly it is, that if all were Christians, or all that call themselves so, would live after the rules of Christ; there would be no occasion for Capital punishments, and consequently no use at all of the Sword. So Justin writes of the Christians in his time, Not paganismus in littera. We, faith he, fight not against enemies: and thus Paul tells us of the Ephesians. There is none among them, that maketh either jewels, Arrows, Swords, Helmeets, or any other instruments of War. So Chrysostome, Si effet inter bonosius quod opes detulisse, pullos pro paenis capitisse; if there were that perfect love among men that there should be, there would be no need at all of Capital punishments. Then also as Aquinas Speaks, would iron and Steel be converted into more innocent and profitable instruments, than for men therewith to kill and destroy each other. Or this place of Esay is to be understood simply and purely, as the words import; and then it is apparent that this prophecy is not as yet accomplished, but the fulfilling thereof, as that of the general conversion of the Jews, is yet to be hoped for; but as we pleasure, in either sense nothing can be from thence concluded against the unlawfulness of War, so long as they that heartily endeavour to live in peace, are not suffered to enjoy it: Or as the Pfalmist hath it, while some are endangering after peace, others are preparing themselves for battle. Many arguments are usually drawn from the fifth of St. Matthew. For the resolving whereof, it is convenient that we should remember what a little before was said, that our great Law-giver intended to have abolished all Capital punishments, and this Right of making War, he would certainly have done it in most plain and express terms, the matter being so weighty, and so new; and the rather, because none of the Jews could conceive or imagine but they were obliged to Moses his judicial Laws, so long as their Commonwealth should stand. This being thus premised, let us orderly examine what plain and concluding power, these places of Scripture have to envince the thing they are brought for. The Second place they urge is this, To have heard it said, an eye for an eye, and a tooth for a tooth; but I say unto you, do not resist him that doth thee an injury, but if any man strike thee on the cheek, turn to him the other also. From hence some do infer, That it is unlawful either to repel, or to avenge an injury, whether publicly or privately. But this cannot be enforced from the words of Christ, who doth not there address his discourse to the Magistrate, but to the person injured; neither doth he there speak of every injury, but of such light ones, as a box on the ear, and the like: The precept following seems to restrain the words proceeding, as if they were too general, If any man will sue thee at the Law, take away thy Coat, let him have thy Cloak also; which words Cyprian thus expounds, What is taken unjustly, seek not to recover. And likewise Ireneus, If any man shall take away thy Coat, do not grieve, as if thou were deprived of it against thy will, but rather rejoice, as if thou hadst given it voluntarily. And if any man shall compel thee to go with him a mile, go with him not grudgingly but willingly, not following him as a servant, but going before him as a guide. It is not every contref in Law that is therefore forbidden, as St. Paul seems to interpret that place in 1 Cor. 6. 1, 2, 3, 4, 5, 6, 7. But he forbids Christians to go to Law for every trifle, to confess their wrongs before the Tribunals of the Heathen, contrary to the custom of the Jews, amongst whom it was a received opinion, Qui adducit negatio Israelitica ad extranas, polluit nomen Dei; he that makes a stranger judge of any controversy between Israelites, pollutes the name of God: but Christ to exercise the patience of his disciples would not have them cavil in judgment for things easily recoverable, as for a Coat or Cloak. For though they might do it Optimo jure, with the greatest Right, yet it was much more acceptable to God rather to suffer such losses with patience, than to prosecute the Law for them. Apollonius Tyanaeus denies it to be the part of a wife-man, to sue for a little money. There is no judge, faith Opian, that can disapprove of that man, who sets little by his loss, as not to accuse himself for it with many lutes, for that man disposition that hates contention, is not to be disallowed. What Opian there faith is approved of by all good men, and there is no more than what Christ there commands, collecting the sum and substance of his precepts out of these things that are most honest and virtuous. But yet, thou canst not hence well conclude, that for a Parent or a Tutor to defend, or recover by Law, that which his Child or Pupill hath been wrongfully deprived of, and without which he cannot subsist, being thereunto compelled, is any violation of this precept of Christ. For it is one thing to contend for a Coat which haply we may spare, and another thing to contend for that, without which we cannot live. In the Constitutions of Clement, it is said concerning a Christian, If he have a suit at Law, let him endeavor as soon as he can to end it, though it be to his loss. What therefore is usually said of moral duties, may also be said of these precepts, that they confit not in a point, like the negative precepts of the Law, from which we cannot deviate in the least without sin; for these have their hue ujque, their certain Latitudes, wherein we may walk safely. So, in that
that precept which follows. If any man shall compel thee to go with him a mile, go with him two.

He faith not, he that compels thee to go with him one hundred miles, this had been hard, because haply it would draw us too far from our own necessary concerns, and so the injury or damage done would be greater to our selves, than the benefit to him: But he mentions a mile or two only, which cannot much endanger us. The sense of the words then must needs be this: In such things as are not very damageable to our selves, we are not too strictly to insist upon our own right, but rather to grant more than is required from us, that our patience and readiness to do good may be known unto all. Thus Justin Martyr expounds these words, What Christ there said, tends only to this, that we should behove our selves towards all men patiently, obligingly, and not prone to anger. But it follows, Give unto him that asks, and from him that would borrow turn not away: Than which words, if not understood with some limitation, nothing found harther. He that takes no care for his Enemy, faith St. Paul, is worse than an infidel: Let St. Paul himself be Judge who was best able to expound his Malters Law, and who exhorting the Corinthians to extend their liberality to the poor at Jerusalem, faith, Not that others should be eased and you burdened, but that by an equality, your abundance should supply their wants: that is, (to borrow the words of Levi, in a case not unlike to this) that out of your store ye may relieve the necessaries of others. Dabo egenti, sed & ipse non egenre, I will give to the poor, but so, as that thereby I make not my self poor, faith Seneca. So also Chrysostom, God requires these things of us that are in our power to give: According to what a man hath, faith St. Paul, and not according to what a man hath not. And he commands the Thessalonians, that they give over what they were able; but yet he doth not exact the same from the Achaikans: To the like purpose is that of Cyrus in Xenophon, What I find superabundant in mine own estate, will be sufficient to relieve the wants of my friends. By all which we may conclude, That this precept of our Saviours (as all the rest which follow in this Chapter) are to be understood with some equitable limitation, and not barely as the words import: The Hebrew law to prevent the cruelty of Husband's to their Wives, did indulge unto them the liberty of Divorce; and to prevent private revenge, whereunto that Nation was too much addicted, gave liberty to the injured person to avenge himself, not by his own hand, but by requiring it from the Judges, according to the Rule of Retaliation; which Law was so pleasing to the Romans, that they inferred it among those in the 12 Tables, Si memebum rapit ratio efla, Etc that breaks a limb shall suffer the like. But Christ being Master of much more patience, was so far from approving this Law, that he would not permit his disciples to repel some injuries either by force or judgment.

But what injuries were these? Surely such as might easily be borne, not that patience was not commendable even in the greatest, but that he was content with somewhat a more limited patience: And therefore he infall at only in a box on the Ear, which neither endangers life nor limb, but implies only a slighting or contemning of us, which doth not at all damnifie us. Seneca in his Book entitled, Of a wise mans Constancy, distinguishes between an injury and a reproach: The former, faith he, is naturally more grievous; the latter more light; and to such only as are nicely bred, troublesome: Quia non ludantur, fed offenduntur, whereby they are offended, but not hurt. Such is the weakness and vanity of mens minds, that they esteem nothing worse than a reproach; so we may find some servantes, that had rather be beaten with stripes, than to take a box on the Ear. So in another place, A reproach (faith he) is much less than an injury, which we rather complain of than revenge, there being no punishment assigned unto it by the Law. So he in Pascuus, Patiar facie irregularum, si affe contumacis. An injury I can easily digest, provided that it be without contumely. To the same purpose aloth is that of Demosthenes, The Tongue wounds deeper than the Sword, and stripes though grievous, yet are more easily born, if not accompanied with reproaches. And the same Seneca a little after tells us, That grief arising from reproach, is an affliction or passion occasioned by the humbleness of a mind contracting if self, by reason of some word or deed tending to our disparagement. Against all these passions which seem to invade the tranquility of the mind, Christ fortes his disciples only with patience; so that in case the wrong offered us either in word or deed, do not much hurt us, it is more magnanimous to overcome them with sufferance and patience, than to seek revenge either by force or Law. And left we should be discouragd by that vulgar laying, Victorem serendo injustum injustus nocens; By over calmly bearing an old injury, we do but invite a new; Our blessed Saviour adds, that even the second is rather to be endured, than the first either repelled or revenged; because such kind of injuries leave no evil Characters behind them, besides what confils in our own foolish conceits. For what St. Chrysostom obterves is very true, Contumelia non ab inferentis animo sed ex judicio eorum qui patiuntur, aut aut seriat, A reproach doth either vex or vanifh, not according to his intention that inferred it, but according to the apprehension of him that suffers it. To offer the Cheek is an Hebrew phrafe, implying the bearing of a thing patiently, as may be collected from Exay 50. 6. and from Jeremy 3. 3. whence the Latines borrowed it, as appears by that Phrafe so often used by Tacitus, Terence;
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Terence, and others, Præsère coenujluæ, is, To bear reproaches patiently.

The third Objection is taken from the words following, It have heard that it hath been said, That this love the Neighbour and hate the enemy But I say unto you, Love your enemies, best them that curse you, and pray for them that despitefully use you, and persecute you.

There are some that think that these duties of Dilection and Benevolence to our enemies, are directly opposite to War and Capital punishments: But this objection will easily vanish, if we do but understand the very words of the Hebrew Law; for the Jews were commanded to love their neighbours, that is Jews or Hebrews (equal unto whom were the Prophets; but the laws which forbade them to do hurt, reached even unto those strangers that lived among them, being uncircumcised, as the Talmudists note) for in this sense is the word Neighbour there taken, as appears Levit. 19. 17. being compared with the Verie there following. And yet notwithstanding were the Magistrates commanded to inflict Capital punishments upon Homicides,seducers of the people to idolatry, and other vain and obstinate Malefactors: So notwithstanding this precept of loving their Neighbours, the 11 Tribes did justly make war against the Tribe of Benjamin, for their more than barbarous inhumanity, Judg. 21. so notwithstanding this Precept, did David, who is said to fight the Lords battels, by force of Arms recover the Kingdom (being promised to him) from Ishboith: But admit that the word, Neighbour, doth now extend it self to all mankind, for as much as are now fellow Denizens, all received into the Covenant of Grace, and no one people accursed from God; yet what was heretofore lawful for the Israelites, will be as lawful for us, both being obliged to the same duties of Love and Benevolence. But you may haply say, That the Evangelical Law requires an higher degree of Love than the Mosical Law did: Even this also I grant with this allowance, that all are not equally to be beloved, our Parents and our Children are certainly to be preferred before Strangers, and our Neighbours before our Enemies. 'Tis true, faith St. Hierom, I am commanded to love mine enemies, and to pray for my persecutors; but yet is it just that I should love them equally as I do my Neighbours and kinsmen? Is it equal that I should make no difference between my Friends and mine Adversaries? Surely the Laws of a well ordered Affection do command me to prefer the Righteous before the wicked, and the publick safety before the safety of any private person. Now out of the very love we bear to the righteous do we put the wicked to death; and out of our care to the publick peace, do we make war upon those that disturb it: If therefore our Saviours precepts do admit of degrees, and it the greater obligation do tye us to the stricter duty, then are we not bound to prefer the noce, when in so doing we endanger, if not destroy the innocent. That of Seneca is very well known, Tam omnibus signecere crudelitatis est, quam multis: It is as great a cruelty to pardon all, as to pardon none. Chrysostom speaking of such humane punishments as are inflicted on the obstinate, faith, that they proceed not from cruelty, but from goodness. And St. Augustine affirms, That as there is sometimes crudelitas parentis, a cruelty in pardoning, so there is sometimes misericordia patiens, mercy in punishing. Those precautions, therefore, that often sin by giving too great encouragement to Sinners, are to be removed: For as Tertul in Proposicii speaks, Pecrare, & prohibere panes pecuniam in paro; He that commits a crime, and he that hides a Criminal from due punishment, are alike faulty. Besides we are commanded to love our Enemies by the example of God himself, who cauffed the Sun to shine and the Rain to fall, as well on the Evil as on the Good: And yet doth the same God put a manifest difference between them, visiting the sins of such as are incorrigible with heavy judgments in this life, and yet referring much heavier for them to be inflicted in the life to come. And thus are all those Objections drawn from those precepts, enjoying Christians to mercy, Ioxiy, beneficence, against war and Capital punishments; easily answered.For Almighty God though he pleased to make himself known unto us principally by these Attributes of Gentleness, Long Sufferance, and Patience, John 4. 2. Exod. 34. 6. yet do the holy Scriptures almost in every page set forth, and declare his indignation and wrath against obstinate and contumacious Sinners, as Numb. 14. 18. Rom. 2. 8. whereof the Magistrate is designed to be the Minifter, Rom. 13. 4. Moses was highly celebrated for his meekness and gentleness, yet did he punish Malefactors with death, and Christ himself the most absolute pattern and mirror of meekness and patience, being provoked by the obstinacy of the Jews ingratitude, is said by a Parable to send out his Armies to burn up their City, and to destroy her Citizens, Matt. 22. 7. the like we may read Mat. 2. 14. and Luke 19. 12. 14. 27. And although the Roman Army were (as Chrysostom observeis) the Axes and the Hammers, yet was it Christ himself that brought those calamities upon them, according to his own predictions, as well by Parables, as plainly and expressly. Nearest unto their Mafter, came the Apostles themselves in imitation of his meekness and gentleness, who notwithstanding made use of the power given them from above, in the punishment of incorrigible Sinners, as is plain, 1 Cor. 4. 21. 1 Cor. 5. 5. 1 Tim. 1. 20.

Their
Object. 4. Their fourth Objection that is brought against the lawfulness of war, is extracted from Rom. 12. 17. *Render unto me no man evil for evil, provide things honest in the sight of all men: If it be possible, *avenging not your selves: but rather give place unto wrath.*

The vulgar Interpretation is, Diai&iot your feuces; But this word is often put by Christian Authors, in this sense of Avenge: And expounds this place very well, where he faith Ifc&'il not evil, (left ye delight in revenge, which seeks the mind fat with other misfortunes.) *See infra B. 2. ch. 20. 5. 16. and 10.*

The first Verse of Rom. 13. was annexed to the precepes in the Chapter foregoing against taking revenge.

Object. 5. 2 Cor. 10. 3. expanded.

Object. 6. out of Eph. 6. 12. expanded.

Object. 7. From whence are Wars and Fightings among you? Come they not hence, even from your Lusts that war in your members? Ye lust and have not, ye kill and destroy and hate, and cannot obtain; ye fight and war, yet ye have not because ye ask not; ye ask and receive not, because ye ask amiss, that ye may consume it upon your lusts. But in these words there is nothing universal, for St. James here condemns only those unnatural wars which the disordered Jews then had among themselves, whereby they were miserably shattered and torn in pieces, (some part whereof

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whereof is recorded by \textit{Josephus} which arose from no other causes but what were unjust: the like we may fee among Christians in these days, though not without remorse; whereof \textit{Titus Lucretius} says: 
\begin{quotation}
This is the vice of Gold, no Wars were then, When sought at Feasts, but Beechen Bowls were seen.
\end{quotation}

So we often read in \textit{Strabo}, how innocently they lived who contented themselves with a single and simple diet; wherewith agrees of \textit{Lucan},
\begin{quotation}
--- O Luxury, of things the wall, That not contented art with mean repast, Ambitious hunger, which for to appease, Both Lands and Seas are sought for raptures: Learn with how little Life \textit{suffus}d may be, And what by Nature's due.---
\end{quotation}

Whereunto we may add that of \textit{Plutarch}, \begin{quotation}
There is no War among men, but what ariseth from some vice; some through inordinate lust, others from covetousness, some through ambition, and immoderate love of glory. \textit{J豆腐} commending the manners of the Scythians faith, \begin{quotation}
They offer not Gold and Silver as other Nations do: And presently after he adds, \textit{This Contemplation of theirs begat in them so much justice, that they coveted nothing that was not their own; for there only are riches inordinately sought after, where they serve for inordinate uses. Memorable is that saying of \textit{Tacitus} the Scythian to \textit{Alexander}, What necessity is there that we, \textit{O Alexander}, should make War one upon another, seeing that thou comest not to abridge us of our Water, or of our necessary sustenances, in the defence of which things only, men contend with reason make War? Much to the same purpose was that of \textit{Diogenes}. Thieves and Incendiaries to War, are never found among such as are contented with homely fare. For as \textit{Polybius} observes, That which is easily got and at small charge, much conduces to the perpetual Piety, even of all. Where- As Tyrants and such as devour Kingdoms, do not raise Wars either Foreign or Civil, to feed courtefully on Herbs, Roots, or Apples; but to pamper themselves with Flets, Fowl, and such like delicious Fare. Therefore \textit{Cicero} speaking of such as were rich and opulent, faith, \begin{quotation}
Do not ye suffer to War, Combinations, Bondage, Slavery, Captivity, Murthers, and immoderate other such like mischiefs and inconveniences commonly arise from these men? I may conclude these and many other such wise sayings of the best men, with that one of \textit{Polybius}, Anyus necessaries is contentus also ad sapientiam magistro non egat; That mind which can be contented with necessities only, needs no other Tutor to learn wisdom. Our with therefore shall be the same with \textit{Justin's}, who having commended the Scythians for their temperance, wihtbeth the like moderation among all Nations: Then might we hope that that Prophecy of \textit{Esai} would soon be fulfilled, that our Swords should be turned into Couteurs, and our Spears into Pruning-hooks; Nation would not then rise against Nation, neither should we learn war. Any more. For what is it that fills the world so full of blood and rapine, that the Sword devours more than those that dye by natural deaths, but only our exorbitant Lufts, whereby we are violently hurried to things unjust and dishonest. Now that which Christ sometimes said to \textit{St. Peter}, \begin{quotation}
He that takes the Sword shall perish by the Sword, \end{quotation}
not properly be longing unto War in its vulgar acceptance, but to private quarrels (for Christ himself gives this as a sufficient reason, why we should neglect our own defence, rather than study revenge; because his Kingdom was not of this world, \textit{St. 13. 36}) shall be more fully handled in its proper place.
\end{quotation}

When there ariseth any doubt concerning the fence of things written, we have two main helps, namely, the common practice of that \textit{Age}, and the authority of the most prudent men, both which are of singular use for the right understanding of the holy Scriptures: According to that ancient rule, \textit{Sanctorum praxis, opimus est praecipuum interpret} \begin{quotation}
The practice of the Saints, is the best interpreter of our Saviours precepts. For it is not probable, that the Apostles did commit all things to clearly to Writing, that might or did concern the Oeconomy of the Church; but that some things were delivered by words only: Neither is it probable, that all the Churches by them establih'd, should quickly forget what was so delivered unto them and practized by them. Now they that dispute against the lawfulness of War, do usually justify themselves by the opinions of some of the ancient Christians, against whom I have these things to urge: First, That from their sayings, nothing can be concluded more than that it was the opinion of some private men, but not the general Doctrine of the Church in that \textit{Age}; especially if it be granted, that those Fathers affected to be singular, and to introduce somethat which was more sublime, than what was generally approved of by those Churches; yea and (which in those times was extraordinary)
Objections out of the Fathers answered.

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Clem. Alex. Strum. 1. 7.

ordinary) to cloath their own Fancies with that generous Notion of an Apostolical Tradition, as may be observed by Origen, and Tertullian: (so Clemens Alexandrinus faith, that it was delivered by a certain secret Tradition from the Apostles, That it was not lawful for Christians to go to Wars; either before the Saints, or before the Gentiles; or for a perfect Christian to swear:) yet are not these Fathers confiant to what they say, for Origen brings in Bees, as a Document. That it was lawful for Christians to make a just and well ordered War, as often as necessity required. And the very same Tertullian, who in another place feems to disapprove of Capital punishments, yet faith, None can deny, but that it much conduceth to the publick safety, that Malefactors should be punished. And again, Who, faith he, would not rather prefer humane Justice (than see a Righetuous man opprest,) which as the Apostle saith, is not begirt with the Sword in vain, and which even in perfecting is Religious. So also to the Proconsul Scapula, We (faith he) do not terrify others, neither are we terrified by others. But we should have all men favoured by admonishing them not to fight against God: So these may both faithfully perform the duty that belongs to thy jurisdiction, and yet not be unmindful of that, of humanity, especially confidering that ye also are under the power of the sword. And as concerning the lawfulness of War he speaks doubtfully. For in his book concerning Idolatry, he faith, It is much questioned whether Christians may take arms, or whether Soldiers may be admitted to Christianity: and in that place he feem to favour the Negative; but in another place, after he had a while disputed against the lawfulness of War, he at length distinguisht between that entred into Arms before he was baptized, and him that lifted himself after Baptism. For faith he, Their condition is plainly others wise, who being first Soldiers were afterwards converted to the faith, as theirs whom St. John admitted to his Baptism; or that faithful Centurion’s whom Christ approved of, and whom St. Peter instructed: Provided that having once embraced the Christian Faith, and being sealed up thitherunto by Baptism, they either renounce the War presently, as some have done; or take special care that they do nothing therein that may offend God. Whereby it is evident, That some Christians did, or at least might continue in Arms after Baptism, which certainly would not have been permitted, had Warfare been by Christ absolutely forbidden; no more than Southlayers, Magicians, and the professors of such like prohibited Arts, were permitted after Baptism to partake in their Diabolical Professions. Tertullian tells us, That who professed such Arts as the Christian Discipline did not allow of, were not to be admitted into the Church of Christ. And St. Aug. infinuates, amongst others, in common Whores, Bands, and Stage Players, none whereof until they had removed their professions would be admitted unto the Sacrament. Of the same opinion also was St. Cyrilian.

Secondly, We may obserue, that in the Primitive times, Christians did either disapprove or avoid the Wars, not because it was in it self unlawful, but in respect of some circumstances incident to those times, which would not admit of the exercise of War without the doing of some acts which were repugnant to Christian Religion. Thus Tertullian forbids a Christian to go to War, not that it was unlawful, but because the Discipline of War did sometimes enjoy such acts, as the Discipline of Christ could not allow of: In the Epistle of Dolabella to the Ephesians, as it is recorded by Josephus, the Jews desire to be exempted from all military expeditions, not simply as being unlawful, but that being mixt with strangers, they could not sufficiently perform the Rites and Ceremonies of their own Law, nor would their Religion permit them to make long marches, or to perform acts of Holiilily on the Sabbath day: and the same Josephus tells us that for these very reasons, the Jews got leave of L. Lentulus to be discharged the Army: The same Historian also relates, that the Jews being banished Rome, some betook themselves to the Wars, others were punished for refusing to take Arms in reverence to their Country Laws, and for the reasons above mentioned; whereunto they sometimes added a third, namely, Because they thought it a sin to make War against their own Country-men, especielly being perfecuted for observing their own Country Laws. But being freed from these inconveniences they refused not to take Arms, and that under foreign Kings, but still under condition, that they might observe their own Laws, and worship God after the manner of their Fore-fathers. Unto these dangers that the Wars exposed them unto may be added, that which Tertullian objects, That they were sometimes commanded to swear by the Gods of the Gentiles, Mars, Jupiter, &c. Which unto Christians was a very great scandal, as well as to the Jews. Whereupon the same Tertullian, in another place thus Apologizeth for them, Shall, faith he, a Christian watch to guard the Temples of these gods whom he hath renounced? Shall he be there where he is forbidden to eat? Shall he be defended those spirits by night which he execrath by day? And a little after, How many other great offences may be seen in military duties, which cannot be otherwise interpreted, but as breaches of our Christian Laws. So that these things are not to be passed over with indifference.
CHAP. II. Arguments from the Fathers for the Lawfulness of some War.

...
Arguments from the Fathers for the lawfulness of some War. BOOK I.

unto we may add, That some Souldiers there were that endured Torments even to death for the Christian Faith; and were therefore worthyly admitted by the Church to the same honour with other Martyrs, amongst whom he makes mention of three of Pauls Companions, one Cerealis under Dioeces, Marinus under the Emperor Valerian, 50 Souldiers under Aurelian, Valerius, Mannus, and Valentinus with divers other. Cyprian concerning Laureontius and Ignatius, both African Souldiers, writes thus, They were once Souldiers fighting under secular Princes, but they were also true Souldiers of God when by the confession of their faith in Christ, they proconfessed the Devil, and by their invincible patience under the Cross were enwombed with the Crown of Martyrdom. Whereby it is plain what esteem the Primitive Christians had of Souldiers, even before any of their Emperors under whom they served, became Christians. And if the Christians of those times did express an unwillingness to be spectators at the execution of Capital punishments; it is not to be wondered at, considering that those punishments were but too frequently executed upon their fellow Christians, especially if we add thereunto some grains of allowance, for that the Roman Laws were far more severe and cruel, than would confit with Christian Lenity; As sufficiently appears by that one Julian Decree of the Senate; the Rigor whereof was somewhat mitigated by the Emperor Adrian, as Spartians records it. Amongst which fewere Laws we may place that which forbade the Testimony of any fervant to be taken unless he was tortured. But after that Constatine the Great began not only to approve of, but to advance Christians, even then also were Capital punishments frequently executed. For even Constatine himself (amongst many others) enacted this Law of fowing up of Paracides in a rack, which is yet extant in the Code, under the Title of Murderers of their own Parents or Children; though he was otherwise so rentius in punishing, that by several Historians, it was imputed unto him as a Blemish. Yet Ecumenus gives this Testimony of him, That he was very mercifull to such as reformed their evil lives: for he would of ten, Afluendabundum eft membris agrotis ac puridium, ne fana canas to corrupatur, non id, quod am fanatum jani fit, aut janucent. That member that is purrid and incurable is to be cut off, left the wound should be infected, but not that which is either heated, or healing. Besides Constatine had a multitude of Christians in his Army, and (as Historians tell us) had the name of Christ embroidered on his Banners, and from him it was that the Military Oath was changed into that form extant in Vigion, namely, By God, by Christ, and the Holy Ghost, and by the Majesty of the Emperor, who according to God’s Ordinance is to be beloved, and revered by all mankind. Neither was there at that time any Bishop (that we read of among so many that were great sufferers for Religion) that did ever reprobe Constatine for putting Malefactors to death, or for making of War; or that did upon the account of Religion, deterr Souldiers from their Military duties, though many of them were severer Disciplinarians, sparing neither Prince nor people, that were defecive in their duties. Such was in the Reign of Theodosius the Emperor St. Ambrose, who thus declares his opinion concerning War, Non Militar Delitium ef, sed proper prudum Militar: Simply 1680 to War: is no sin, but to fight for food and plunder is wicked. So likewise in his Offices, That force whereby either our Country is defended from our enemies by War, or the weak and innocent defended at home, or our Associates from Planta and Robbers, is perfect Justice. This Argument is of a great force, that I shall need no other. And yet I am not ignorant that sometime Bishops and other good Christians have often by their Intercession turned Capital punishments, into Pecuniary Mults, or some lesser punishments not reaching to life: Officium facereditis ei interventio pro reis; It is the duty of a Priest to interceded for the guilty, faith Aug. And there is a right introducere by Custos. That they that flee to the Altar for Sanctuary, are not to be delivered up until faith be given for the saving of their lives; and that such as were for midemenors delivered to Pfalon, should at Easter be freely releaved; but that they thoroughly perpends these and such like Custums, shall find, That they proceed rather from minds fall from Christian Charity, which watcheth all opportunities and occasions to do good, than from minds quarrelling at the extant of Capital punishments: whence it was that the privileges of those times and places, yea and the very intercessions themselves were moderated with some exceptions, as we may learn by Caflorbers. But here some will object against us the 12th. Canon of the Council of Nice, which founds to this fence, If any being by the grace of God called, shall fully express their faith by defiting the War, and afterwards returning to their conitin shall by money or favor, seek to be re-admitted into the War, those after the three years allowed them to bear the word, shall remain among the Penitentials for ten years. But in this case a strict observation must be taken, how such persons stood affected, and what fruits of Repentance they bring forth; for whatsoever among them shall shew forth their sincere conversion by fear, by tears, by patience and good works without diffimulation, those fulfilling their three years of hearing shall at length communicate in prayers, and afterwards it shall be lawful for the Bishop to deal more tenderly with them. But if any of them
them shall bear it but indifferently, and shall think that their very entrance into the Church is sufficient, these shall fulfill their whole time. Whereunto Lanier, that by the time of 13 years Penance we may collect, That the sin was neither small nor dubious; for so great a punishment must needs be inflicted for some Crimes that were both to God abominable, and to all good men scandalous, which without question was idolatry. For the words preceding in the eleventh Canon do manifestly refer us to the times of Licinius, which gives a very great light to the understanding of the sense of this Canon. This Licinius as Eusebius relates, in his War against Constanzin, first turn’d all Christians out of their houses, and made false of their goods; and then drew out all the Christian Souldiers and Officers both out of his Armies and Cities from the rest: and then commanded, That unless they would of their own accord sacrifice to Devils, they should all of them be castrified from their Offices. (Which fact of his was afterwards imitated by Julian,) whereupon many renounced their commands, and among them, one Victorius; so did 1104 more in Armenia under Dioeciani, concerning whom, there is honourable mention made in our Martyrologies: and so in Egypt did Menne, and Hesychius. So also in the times of Licinius, did many renounce their Commands, amongst whom was Artemius, mentioned among the Concellors, and one Auxenius afterwards made Bishop of Mopsuestia. Now they, that out of tenderness of Conscience had formerly renounced their Commands, had no possible means to be re-admitted under Licinius, but by a publick Abjuration of the Christian Faith: wherefore as they that were so admitted, committed much the greater sin (being against knowledge and Conscience) so they deferved a much greater punishment, than those mentioned in the foregoing words of the Canon, namely, that without any danger either of life or goods had renounced their Christianitie. But to interpret this Canon so generally, as if it comprehended all manner of going to War, is infinitely against reason. For the same Historian testifies, That many of them that under Licinius had laid down their Arms, and whilst Licinius Reigned, did never re-assume them, because they would not abjure their faith in Christ, being by Constan tine left to their own choice, were upon their request, re-admitted. There are likewise, that urge against us the Epistle of Pope Leo, where it is laid to be against the Ecclesiastical Canons to return into a Secular War, after the Act of Repentence. But here we must understand, That from Penitentiaries as well as from Priests and Monks, there was required a more strict, and autentick course of life, than what was required from other Christians: That they might be as great examples to others, of Contrition and Humiliation; as they had been before, of prevarication. For as Leo well observes, \textit{Illicitum veniam postulamem, opus est una multis licitis abstiner.} It is but just that he thus begs pardon for his unlawful acts, should abstain from some things otherwise lawful. So in an Epitile wrote by some Bishops to King Lewis we read, \textit{Quisibet tanto se licita debet abstinere, quanto se meminit & illicita perpetrass. Every man ought so far to abridge himself of things lawful, by how much more must he that hath committed some things unlawful.} So in those ancient Customs of the Church which to gain the greater reverence are commended unto us under the name of the Apostles Canons, it is decreed that no Bishop, Priest or Deacon should additc himself to the War, so as to retain the dignity of both Functions, both Civil and Sacerdotal; But leaving unto Caesar the things that are Caesars, they should give unto God, the things that are Gods. Whereby it appears that they who were not thought worthy to be admitted to Ecclesiastical dignities, were not interdicted those that were Military: with this also, That none who after Baptism had obtained any Office Civil or Military, could be admitted into the Clergy. As may also be collected from some Epistles of Synesius, Innocens, and from the Toletan Council. For Clergy men were not chosen out of any sort of Christians, but out of such as were like to be exemplary unto others in austerity of life and manners. Besides upon Military Officers, as also upon some Civil Magistrates, there lies a perpetual obligation: But such as put themselves into Holy Orders, ought not to be entangled with any other care, nor diverted by any other daily Labour. For which cause, it was provided by the 6th Canon, That no Bishop, Priest or Deacon should take upon them, any secular employment, nor thrust themselves into any publick Office. And by the 6th. Canon of the African Council, They were forbidden to be Solicitors of other men’s affairs, or to defend other men’s causes. But that which gives the greatest reputation to our opinion is, the judgement of the Church which we have set down in the third Canon of the first Council of Arles which was held under Constantine. The words found thus, Concerning thoes that cast away their Arms in the time of peace, it pleaseth the Synod, that they should be debared from the Communion: that is, They that lay aside their Arms when there is no perfeccion that threatens them, for by the word, Peace, the Primitive Christians understood only a vacency from persecution, as appears by Cyprian and others; \textit{Noftra paci, quod est helium quam perfecution? As to the peace of the Church, What greater War can there be than persecution?} So St. Tertul. Cypriam
Cyprian, when God began to give peace unto his Church; That is, when he freed it from Persecution. Next we have the example of Julian's Soldiers, who were no mean proficients in the School of Christianity; for they were ready to testify their faith in Christ by the effusion of their blood, of whom St. Ambrose speaks thus, The Emperor Julian though an Apestat, yet had many Christians that fought under his Banner; to whom when command was given to march against the enemy in defence of their Country, they readily obeyed: But being commanded to march against the Christians, then they acknowledged no Emperor but the King of Heaven. Such also were long before them the Theban Legion, which in the Reign of the Emperor Diocletian was converted to the Christian Faith, by Zabda the Thirtieth Bishop of Jerusalem, which Legion did afterwards leave behind them a singular pattern to all future Generations of Christian patience and constancy; whereof I shall have occasion to speak more at large hereafter. It shall suffice in this place to rehearse that excellent speech they made to the Emperor, which both boldly, and summarily represent unto us the Duty of a Christian Soldier: Against any Foreign Power we freely offer our hands, which yet we dare not embrow in the blood of Innocents. Our Arms which have been long practised in suppressing vice, and in vanquishing Foes, never yet knew how to oppress the Righteous, or to cut the Throats of our Neighbours and fellow-Citizens. When we engaged in War we remember, it was to protect and not to destroy them: we have hitherto fought for Justice, for Piety, for the defence of Innocence: For these prizes we have fought all dangers, we have fought for the defence of our faith; which should we have broke with God, How canst thou, O Emperor, expect that we should keep with thee? Basil also gives this Testimony of the Primitive Christians, That their Ancestors never accounted that execution that was done in War as Martyrdom, but always held them excused, those fought for the defence of Chastity and of Piety.
War divided into Publick and private. The Supream Power explained.

I. War divided into Publick and Private.

II. That by the Law of Nature, even after Tribunals were erected, all Private War was not unlawful: proved.

III. No nor by the Evangelical Law: The Objections answered.

IV. Publick War divided into that which is seelam, and that which is les than sollem.

V. Whether a War made by the Authority of a Magistrate not having Supream Power, be Publick and when.

VI. Wherein the Civil Power consists.

VII. What Power is Supream.

VIII. The opinion that the Supream Power is ever in the people, refuted, and the Arguments answered.

IX. As also, that the Subjection between King and people, is mutual.

X. Cautions for the right understanding of this Question; wherein the first is to distinguish between the likeness of words, in things that are unlike.

XI. The Second is to distinguish between the Right and the manner of holding that Right.

XII. That some Empires are held fully, that is, with a Power to alienate them.

XIII. That others are held not so fully.

XIV. That some, though not Supream, yet are held fully, that is, with a Power to alienate them.

XV. The said distinction appears by the differences in assigning Protectors in Kingdoms.

XVI. That the Publick ceaseth not to be Supream, by a promise even of that which is not due by the Laws, of either Natural, or Divine.

XVII. The Soveraign power is sometimes divided into parts subjective and potential.

XVIII. Yet it cannot be well concluded, that the power is not Supream, because Kings will not have their Acts to be firm, unless approved of by some Assembly.

XIX. Some other examples not to be drawn hither.

XX. True examples of the Supream Power divided.

XXI. He that is tied up by a League on terms unequal, may, yet, retain the Supream Power.

XXII. So may he that pays Tribute.

XXIII. So may he that holds it from another in Fief.

XXIV. A man's right may be distinguished from the exercise of that Right, with several examples.

The first and most necessary division of War is this: That some are Publick, and some Private, and some mixt. Publick is that which is made by publick Authority; and Private is that when the Authority is so; and mixt when it is in part Publick, and in part Private: and First, Let us treat of that which is Private, as being most ancient; That by the Law of Nature some Private War may lawfully be waged is, as I suppose, sufficiently proved by what hath been already said, where it was shewed, That to repel force with force, was no ways repugnant to Natural equity: But the Question will be, Whether since the erection of Courts of Justice, it be now lawful to repel force with force? Whereunto I answer, That although Courts of Judicature were not instituted by Nature, but by humane Authority: yet both natural reason, and Common equity instruct us, That it is more agreeable to common Honesty, and to the conservation of peace and tranquility amongst men, that all differences should be publicly scanned, and determined by persons that are unconcerned; rather than by them, who being blinded with self-love, do oft-times illmke right for wrong, and will do that only which seems good in their own eyes: Non est jurisgalis concedendum quod per magistratum publice posset fieri, ne occaso fit majoris tumultus faciendo; That is not to be granted to every private man, that may be done publicly by a Magistrate, lest for every petty injury men run into Tumulti. And hence it is, saith King Theodorick, That so great a reverence is due to the Laws, that no man ought to revenge himself with his own hand, or by the suggestion of his own passions. For if all differences may be determined by plan force, wherein would a calm peace differ from the tumults of War? And therefore the Laws call that Force, When any man takes that which is his due with his own hands, without the determination of a Judge.
II.
That Tribunals being exalted, all war is not unlawful.

Molt certain it is, That the Licence which before Tribunals were established publickly, was permitted, is since much restrained: And yet in some places the same Licence still remaineth, namely, where Judgment cannot be had against offenders. For the Law in prohibiting a man to take his own, unlefs it be judicially, doth tacitely imply that it be in such a place, and at such a time where an ordinary course of Justice may be had.

Now Judgment ceaseth either for a while only, or for continuance: For a while, when the judge cannot be so long waited for without certain danger and damage. Seruus upon these words of Virgil, Injurere manum parce, The Fates have snatcht him hence, tells us, That the Poet makes use of a Phrase borrowed from the Law: for it is called Injelio manum, the snatching away of a thing, as it were by force, when without attending the warrant of Authority, we suddenly seize upon sometbing that is our due, which is usally done when the Laws do for a while cease. And sometimes there is a total and continued cellation of Judgment, and that either by Right or in Fact. By Right, as in places that are desert and unoccupied, on the Seas and in Islands not inhabited, and in any other such places wherein are not civil Societies. In Fact, as when Subjects do not regard the Sentence of the Judge, or the Judge publickly refuses to examine the cause. Now what we said before, namely, that since publick Judicatures were established, all Private Wars are not repugnant to the Law of Nature; is clearly evinced by the Law given to the Jews, where God gives this charge by Moses, If a Thief be found breaking up (i.e. by night) and be slain that he dye, there shall be no blood shed for him; but if the Sun be risen upon him, there shall be blood shed for him. Certainly this Law so accurately defining of the time when the offence was committed, seems not only to induce an imputation, but serves to explain even the Law of Nature; being not so much grounded on any one particular Divine Precept, as indeed upon common equity, which guided other Nations also to do the like. The old Attick Law was this, If any man shall steal in the day time, to above the value of fifty Drachmaes, let him be tried by eleven men: But if a man shall steal to the smallest value in the night, he may lawfully be killed. This ancient Law of Salom dothles occasioned that of the twelve Tables among the Romans.

Vide infra

Br. 2. ch. 12.

Saron's Law.

But whether this private war be justifiable by the more perfect Law of the Gospel, is somewhat more doubtful: I dare not but grant that Almighty God, who hath a much greater power over lives than we have, might have imposed upon us such an unlimited patience, that even privately, in a cafe of imminent danger, we ought rather to be killed than to kill. But whether it be his pleasure thus strictly to dye us up, is the thing in question. There are two places of Scripture that seem to favour the Affirmative, which we quoted above when we handled the general question: The former was that in the fifth of Mat. v. 30. Retb not him that doth thee an injury: And the latter that in the twelfth to the Rom. v. 19, Dearly Beloved, Avenge not your selves; which the Latin Translation renders, Defend not your selves. But a third may be added, namely that of Christ to Peter, Put up thy Sword into the Sheath, for they that take the Sword shall perish by the Sword: Some there are likewise that urge the example of Christ himself, who dyed for his enemies, Rom. 5. 8, 10. Neither are there wanting among the Ancients, some, who although they do not disallow of publick War, yet believed that all private, even that which is defensive was forbidden. Some places out of St. Ambrose for war we allledged above, but more and much more clearer, and more generally known, may be produced out of St. Augustine: But yet the fame Ambrose in another place faith, That papily therefore Christ said unto Peter, when he showed him two Swords, It is enough: As if till the Gospel came it had been lawful, that so there might be, as in the Law the doctrine of Equity, so in the Gospel the doctrine of Verity. And in another place he tellles us: That a Christian though assaulted by Robbers, ought not to strike again: Ne dum salutem defendas, pictatem contamines: Left whilst he seeks to preserve his own safety, he sin against piety. And St. Augustin himself speaking of Thieves and Robbers, faith, Legem quidem non reprehendes, quae tales permittit interfici, fed quamodas ilias qui interficiant, defendam, non invenias. The Law that adjudgeth these men to death, I disallow not: but how to jusitifie the Executioners, I find not. And in another place, But as to them that give advice, that some men are to be put to death, left others by them should be defroyed, I cannot subsist, unless he be that kills him either a Soldier or a publick Executioner, who doth it not by his own, but by publick Authority. And of the fame opinion was Bafs, as appears in his second Epistle to Amphilochius, whereunto we may add the last Canon of the Council of Orleans, cited by Gratian. But the opposite opinion, as it is more Catholic, so it seems to be more agreeable to truth, namely, That Christians are
not obliged to such an height of patience: We are indeed commanded by the Christian Law, to love our Neighbours as our selves, but not above our selves; so that when we are both of us involved in the same, or in equal danger, we are no where forbid to prefer our own safety before another's; as we have already proved by the Rules St. Paul gives to Christian Beneficence, and which Cæsarius in the duties or offices of Friendship likewise confirms. There is, faith he, neither Law nor Reason, that can oblige us to redeem another man's soul with the loss of our own; or to procure the preservation of his body (setting aside our hopes of eternal salvation,) with the certainty of our own ruin. But if any man should object, that we are bound to prefer our selves before others in dangers that are equal, but not in such as are unequal; and therefore I ought rather to give up mine own life, than to suffer him that invades me to fall into eternal damnation. To this we answere, That it is probable that he that is assaulted may stand in as much need of time to repent in; and that the Aggressor may also have space sufficient before he dye, to do the same. Besides, that danger into which a man wilfully calls himself, and out of which he may (if he please) redeem himself, seems not in any Moral Judgment to be much esteemed. Certain it is, That some of the Apostles even to the last time, and in the presence and in the very light of Christ, pleft to travel begirt with Swords; and so did other Galileans journeying out of their own Country towards Jerusalem, (the High-ways being much infalted with Thieves, as Josephus informs us;) So also did the Elenes, the most harmless of all men, as the fame Historian records it. And hence it came, That when Christ told his Disciples that the time was at hand, when they should sell their Veils to buy themselves Swords, Luke 22. 36. some of the Apostles readily made answer, That there were in their company two Swords: But at that time there were none in that company but the Apostles; so that it must needs follow that some of them did go, even in Christ's own presence, armed with Swords. Besides, what Christ then said, although in truth it was not a Precept but a Prophecy, foretelling those many dangers that were then at hand, (as appears by that opposition which these words have unto those in the 31st verse, which speaks of the first times which were secure and prosperous wherein they needed neither Money nor Swords, whereas in the latter times that were approaching they should have need of both,) yet was it such, as seems to be taken from that which was then wont to be done, and which the Apostles might lawfully do. It was well said of Cicero, Gladius habere certe non licet: nisi illis nullo patello licet: Surely it was utterly unlawful for Christians to have Swords, if it were altogether unlawful for them to use them.

But as to the other Objection taken from Matt. 5. 39. namely, That we reslit not him that doth us an injury; It is no more of universal obligation than that which follows, Give unto every man that asketh; which doth nothing subjoined unto it to restrain it, but is left to the judgment of common equity; whereas this of non-refrains, seems to be both explained and restrained by the subsequent instance of a Box on the Ear; that we may understand that that precept doth not oblige us, when the injury done us is but light and easily born, such as is a blow on the Check, or somewhat that is like unto it; which rather argues a contempt in the striker, than infers any considerable damage to him that is struck: For otherwise it had been much better have had, Reslit not him that injures thee, no though he should attempt to kill thee. And as to those words of St. Paul to the Romans, Aveinge not your selves, the word ἀνεξαντία there used, doth not properly signify to defend, as the Latin Translation renders it, but to revenge, as appears by other places where the same word is used: As Luke 18. 7. 8. And shall not God avenge his own Elect? So also, Luke 21. 22. These be the days of Vengeance: The like we find 2 Thess. 1. 8. 1 Pet. 2. 14. And this the connection of the words will plainly shew, for the words preceding are thes, Requisite no man evil for evil: which is the proper description of Revenge, but not of Defence. Besides, St. Paul strengtheneth this advice with that place of Deut. Vengeance is mine, I will repay it: which must necessarily be understood of vengeance for injury: for neither can the Hebrew word there used be in propriety of speech, nor the congeity of the Sentence in that place possibly understood of a bare Defence. Now as to that which was said to St. Peter, Put up thy Sword, &c. It doth indeed prohibit the use of the Sword at that time for revenge, but not at other times in cases of necessary defence: Neither indeed had Peter at that time any need of Defence; for Christ had already interceded for his Disciples, saying, Suffer these to go away, John 18. 9. Nor had Christ himself any need of St. Peter's Sword: For thinketh thou, faith he, that I cannot now pray to my Father, and he shall send me more than ten Legions of Angels? Neither would he then be defended, for he thus infers, Shall I not drink of the Cup that my Father hath given me? ver. 11. And so in Matt. How then shall the Scriptures be fulfilled, that thus it must be? Whence we may conclude, That St. Peter was at that time transported.
Objec Toni answered.  

BOOK I.

The Objects, an

Christian may bear

Solemn War

what is it.

Ported with an eager desire of Revenge, (being very hot and zealous) and not of De-

fence only: Whereunto we may add, That Peter did make use of his Sword against

thee that came armed against Christ with publick Authority. Now whether any case

will justify our resistance of those that are thus armed, is a peculiar question hereafter to

be particularly handled: And whereas Christ adds these words, They that take the Sword

shall perish by the Sword; it was either Proverbially spoken, to shew that blood requires

blood, and consequently that the use of Arms was never without peril; or rather as

Origens, Theophilus, and others interpret the place, it shews that we should not be too

rash in taking the Sword of Vengeance out of Gods hands, who will certainly in his own
time repay blood with blood. And in this fence it is expressly laid, Apoc. 13. 10. He

that layeth himself to Captivity, shall go into Captivity; He that killeth with the Sword,
shall be killed by the Sword: Here is the patience and faith of the Saints; very confection whereunto

is that of Tertullian, So fit is God to be trusted with thy patience; that if thou claim thy sufferings unto him, he will be thine Avenger: If thy grief and pain, he will be thy Physician, If thou trust him with thy Death, he will raise thee up again: O how great a power both

patience, that is able to make God himself to become our Defender! Besides, In these words of

Christ, there seems to be contains a Prophecy of those punishments, which God would take

of the blood thirsty Jews by the Sword of the Romans. But as to the example of Christs
dying for his enemies, it may be thus answered: Though all Christs actions upon Earth

were full of virtue and goodness, and such as may be (so far forth as human frailty

will permit) lawfully imitated by us, and that cannot want their reward; yet were they

not all such as were done, either in obedience to any Law; or being done, are obliging,
as a Law unto us. For that Christ dyed for the wicked, and for his enemies, was not by

the Command of any Law, but by a special agreement and Covenant with the Father,

who had promised that for his suffering, He would not only exalt him in glory, for above all

Principalities and Powers in Heaven or Earths; but that he would build him also a Church, an

holy Seed, that should endure for ever, Eph. 5. 10. But this fact of Christ was other-

wise singular, and not to be parallel'd, as St. Paul testifieth, Rom. 5. 7. And Christ indeed

bids us to expose our lives to peril, yet not for every man, but only for the Brethren,

that is, for those that profess the same Faith with our selves, 1 Jo. 3. 16.

And as to those Sentences that are quoted out of the Fathers, they were partly good

Fatherly Calms, and Exhortations to an holy life, tending to perfection rather than any

brief precepts to oblige us, and partly their own private opinions, rather than the

doctrine of the whole Church: For in those ancient Canons called the Apollines, He was
to have been excommunicated, that in a Fray had slain his Adversary at the first blow for his

too much heat or refines. And St. Augustin himself whom we before quoted in the de-

fence of the contrary opinion, seems notwithstanding to approve of this in his 84th

question upon Exodus: So also doth St. Ambrof, O Lord, faith he, Why dost thou command

me to buy a Sword, if thou forbiddest me to strike? Why dost thou bid me to have one, if having

it, I may not use it? Unless perhaps that wouldst have us to be armed for defence, but not for

revenge.

Of publick Wars some are solemn solemn according to the Law of Nations, and some are

les solemn: That which I here call solemn, is usuall and for the most part called just,
in the same sense as a Testament is being opposed to a Codicil; or as a solemn Marriage
between such as are free, compared to a Clandestine between such as were bond: Not

that it was not lawful to bequeath Goods by a Codicil, or for a Servant to have his mar-

ried woman with him in the same house; (for even among Freemen there are some mar-

riages not just, and some children not just, as Paulus the Lawyer notes, and some liberty

not just, as Servus observes;) But that a solemn Testament and a solemn Marriage,

hath by the Civil Law some Rights and Effects peculiar to themselves, which others have

not; which is very useful to be observed: For that many misunderstanding the word jure,

condenm all wars as unrighteous and unlawful, that are not solemn. Now that a war

be solemn according to the Law of Nations, two things are requisite: First, That it be

on both sides made by the Authority of those who in their respective Cities have the So-

veraing power: And next, That it be waged with such Rites and Formalities as the Law

of Nations requires, whereof we shall discourse in its proper place. And because these

are joyfully requisite, therefore the one without the other is not sufficient: That publick

war which we call lef solemn, may be both defective in these rites, and also be made against

private men, and that by the Authority of any Magistrate. And truly if we

consider the thing it self without regard to the Civil Law, every Magistrate as he is
entrusted with the peoples safety, so (in case any violence be offered) he is entrusted with
the exercise of that power and jurisdiction, and consequently hath a power to make war.

But because by war the whole City is endangered, therefore it is provided by the Laws of

almost all Nations, That no war be made but by the Authority of him who hath the

supreme power in that City. Such a Law we find extant in Plato, and by the Roman

Laws.
Laws, whoever should presume to make War, lift Soldiers, or Muster an Army, without special warrant from the Prince, was held guilty of Treason: Or as the Cornelian Law, intituled by L. Cornelius Sulla, faith, without warrant from the people, placing the Sovereign Power in them only. There is an ancient Constitution extant in the Code of Justinian, made by Constantines and Valens, which runs thus: Let no man presume to raise an Army without special warrant, or to make War without our knowledge and advice. Pertinent whereunto is that of St. Augustin, Tant Naturalis Ordine which is well accommodated to the preservation of human peace, requires that the Counsel and determination of raising of such an Army should remain in the power of Princes: Now as all other Rules, be they never so general, must admit of equity to be their Interpreter, so must this Law. First then, it cannot well be doubted, but that it is lawful for him to whom the Lieutenancy of any City is committed, to reduce into obedience, by his Officers, some few Rebels; so as it require not any great force to do it, nor much endangers the City wherein he prefigures. Or in case the danger threatening the City be very great, and so imminent that it will not admit of so much time as to consult the Supreme Magistrate, pure necessity will plead strongly for exemption. Upon the premission of this It was that, L. Licinius Governor of Emesa, a Carthian in Sicily, being certainly informed that the Townsmen had design'd to revolt to the Carthaginians; preferred the said Town, by putting to death the chief Conspirators. Nay even beyond these cases of Necessity, If a King do neglect to revenge the injuries of his Subjects, Franscescu de Victoria is so bold as to transfer the right of making War upon the Citizens: But herein he walks by himself, for by all judicious Writers this opinion is rejected as dangerous.

But by what event ever it happens, that the power of making war is manifestly in inferior Magistrates, whether such a War may be said to be publick, Lawyers agree not: For some affirm it, and some deny it: Surely if by publick we understand nothing else but what is done by the right of a Magistrate, such Wars are publick: And therefore he that in such a case shall set himself in opposition to the Magistrate, incurs the punishment due unto those who behave themselves contumaciously against such as are for over them. If we take the word Publick in the better sense, for that which is solemn, as without question it is usually taken; then are not such Wars publick: For to the legitimating of such a War there must go, as well the judgment of the Supreme Authority, as other Rites and Ceremonies which the Law of Nations have made necessary. Neither doth it at all stagger me that even in such wars, the goods of such as make resistance are lawful prizes, and given to encourage the Soldiers; for this doth not so peculiarly belong to a solemn war, but that the same may be done in any other. Besides, it frequently happens that in Empires of large extent, the Lieutenants of Provinces are empowered by their Prince to begin a War; which if so, then it is all one as if the Supreme Magistrate had immediately done it: Quod facienda est quis aliis dat, ejus usque ad manus contraer; Look, What right any man gives to another to do, that he himself it repays the Author of. But that which admits of a larger dispute is, Whether in case no such publick power be given, the subordinate Magistrate by conjecturing at the will of his Prince, may make War. But this I cannot admit of, for it sufficeth not to foresee what the will of the Prince would be, in case he were consulted withal; but we are to consider, what a Prince would have a Magistrate to do without sufficing him, in case the matter be important, and will admit of time enough for a serious debate, if a general Law were to be made thereupon. For though the reason that moves a Princes will, being particularly inspective, may in some particular fact cease; yet the reason universally taken, ceaseth not, which is, That all dangers should be timely prevented: which could not possibly be, if every inferior Magistrate should assume unto himself the Right of making War. On. Maiorius was not therefore unjustly accedited by his Lieutenants, that without order of the people of Rome he had made war against the Gallo-Grazians. For although there were certain Legions of the Gauls in Aquitania, such as had been revenged on the Gallo-Grazians, was not in the choice of On. Maiorius, but of the people of Rome; Cat's opinion was, That Cesar should be delivered up to the Germans, for making a War against them without order: But (as I believe) not so much regarding the equity of the thing, as indeed to free the City of the fear they had of so potent a Master; for the Germans had given assistance to the Gauls, being then enemies to the Romans; and therefore had no reason to complain of any wrong done them, in case that war with the Romans against the Gauls were just. But Cesar should have been contented to have beaten the Germans out of Gallia, which was the Province allotted to him, and not have prosecuted the War into Germany, without first consulting the people of Rome; especially considering that there was no danger then imminent: The Germans therefore could have no right to demand Cesar, considering that they had given the Romans just cause to make War upon them; but the Romans had just cause to punish Cesar for transgressing his
Commision: as the Carthaginian Embassador told the Romans plainly, in the very like case, I do not think it fit for you, faith he, to enquire whether Saguntum were besieged by the publick, Edict of the City of Carthage, or by the private Authority of our General: but whether it were done justly or unjustly? For it concerns us only to call our own Subject to an account, by whose order he did it. The only dispute between us and you is, Whether it might be done without breach of our League with you or not? Cicero defends the fact both of Olearius and of Decimus Brutus, who upon their own private judgments made war upon Anthony: But although it had been as clear as the Sun, that Anthony had deserved it, yet should they have confin'd the Senate and the people of Rome, before they had begun it. For although it were granted, that the afront given, did manifestly deserve an hostile invasion; yet ought they to have expected the judgment of the Senate and People of Rome, whether it had not been more expedient for the Common-wealth, at that time, to have dis-embled it, than to have revenged it; to have treated with him about Articles of Peace, than to have rush'd presently into Arms: For no man ought to be compelled to pursue his own Right, when it cannot be done without fear of a greater los. Besides, Suppose that Anthony had been declared an enemy, yet ought the Senate and People of Rome to have had their free choice, under whole conduct that War should he carried on. Thus the Rhodians answered Cniffus, demanding Ages of them according to their League, That they were ready to fend them if the Senate should command them. By this and the like examples (for many such we shall meet with) we may learn, not to approve of every thing that Historians (though of never so good fame) seem to commend unto us: For sometimes they are awed by fear, sometimes by flayed by affection: fitting their Stories to their own occasions: wherefore in such cases we should endeavour to be guided by our own uncorrupted Judgments, and not rashly to make those Actions our Precedents, which deserve rather to be excused than appalnd; whereby we may be drawn into pernicious errors. Now whereas it hath been said, That a publick War cannot jufly be undertaken without the Authority of the Supreme Magistrate: it will be necessary for the better understanding as well of this Question, and of that of a So-lemn War, as of divers others, to enquire what that Supreme Power is, and in whom it refts: And the rather, because the Learned of this Age, do not fo well determine it; for whilft each of them pursues this Argument, rather according to present use and eu-phem, than according to truth: they have rended that which, of itself, was not very cafe, much more dark and obscure than it was before.

That Moral Power whereby Common-wealths are govern'd, which Various calls the Civil Power, he describes by three things: where he calls a City, that is truly 

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VI.
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Power,what?

Power,what?
That we call the Supreme Power, whose Acts are not subject to the power of another, nor can by any Humane Authority be made void; when, I say, by another, I exclude him who hath this Supreme Power, in whose power it is to change his own Will; I also exclude his Successor who hath the same right, and so the power and no other.

This therefore is that which we call the Supreme Power: Now let us see in whom it reposes, the Subject wherein this Sovereign Power remains, is either common or proper: As the common Subject wherein Right reposes is the Body, the proper Subject is the Eye; so of this Supreme Power, the common Subject is the City or Common-wealth, which, as I said before, is a perfect company or society of men. Hence then we exclude those who have given themselves up to the power of another people, as those Nations that were conquered by the Romans, were no longer called Kingdoms, but Roman Provinces: For such a people cannot be called a City, in that sense wherein we now take the word, but the unworthy Members of that City that conquered them, as Servants are the meanest Members of a Family. Again, It sometimes happens, that of divers people there is but one and the same head, and yet every one of these people do constitute one perfect Society; for it is not so in the Moral, as it is in the Natural Body, where it is not possible that one Head should govern two Bodies: For in the Moral, one and the same person diversly considered, may be the head of divers and distinct bodies, whereas this is a most infallable sign; for whenever the Regal Family of him in whom the Sovereign power over divers Nations was united, shall be extinct; the power it self separates, and each reverts to its own people. So it may fall out, that many Cities may be link'd in by a traitor, a confedracy, that (as Strabo speaks) they may constitute but one well governed Body; and yet doth each of them still retain the rate of a perfect City; as is well observed both by others, and also by Aristotle in divers places; so then the common Subject wherein this power resides, is a City so understood as I have already express'd. But the proper Subject of this power is either one peron or many, according to the several Laws, Customs, and Manners of every Nation.

And here first we must disclaim their opinion, who affirm the Supreme Power to be (every where, and without any exception) in the People; and that so fully that it is in their power, either to enforce or to punish their King, if he govern amiss: What great mischiefs this opinion, being once fixed in the minds of the Rabbis, already hath; and hereafter may introduce, there is no wife man but may easily discover. For con-

vutation of which opinion, we offer these Arguments to the more ingenious Reader.

By all the Laws both of the Hebrews and Romans, it will appear; that it is lawful for every man that hath power over himself, to bind himself as a Servant, or an Apprentice to whom he pleaseth. And why then should it not be as lawfull, for any people naturally free, to give themselves up to any one person or Society to be governed wholly by them, without retaining any part of their liberty to themselves? Neither will it suffice to say, this is not to be precum'd; for the question is not what in a doubtful case is to be presumed, but what by Right may be done; and it is as vain and frivolous to urge the inconveniences that may arise from hence: For there is no form of Government whatsoever, be it never so well fenced and framed in the Brain, but upon the exercise of it will produce some inconveniences and some dangers with it. So that we must, do what we can, resolve to take the advice of the Comedian, Aut hac cam illius sunt ha-bindas, aut illa cam his mittenda sunt; either to accept of the inconveniences with the conveniences, or to renounce both; and do live like Beasts without Government, which is the grea-test inconvenience of all. As there are several kinds of Trades or Callings for men to live by, some better, some worse, and every man is permitted to chuse which he pleaseth; so there being several forms of Government, it is in the peoples choice which of them they will be governed by: Neither is the right to Govern to be measured by the excellency of the Form, whereof divers men judge diversly, but by the freedom of their own will: What Cato sometimes said of Laws, may as well be said of Governments; There are none so perfect, but have some defects. But what the same Cato observed is very true, it is sufficient to commend any Government, that it produceth good effects in the general, and profitteth the greater part of mankind. Now, as Cicero speaks, To reconn up all the inconveniences only in any Government, and to pass over with silence all the conveniences is unjust, because the good that we seek for we cannot obtain, without the evil which we would avoid. But of these severall kinds of Government our choice being made, and the right thereby transferred to another, to realisize it at our pleasure upon what pretence soever is unjust. Many causes there may be for which a people may be induced to renounce, and yield up unto others all right of Government: As namely, when they shall be reduced into so great danger of their Lives, that no other way can be found whereby to defend themselves; or when they shall be opprest so much want, as that they cannot o- therwise sustaine themselves. Thus the Israelites being distress'd by the Ammonites, sent for Jephues, and rather then be opprest by a Foreign enemy, they transferred the Go- vernment to another.
government upon him, whom before they had banished, Judges 11. This also was the condition of the Campaens, when they surrendered themselves unto the Romans, in this Form; We, say their Embassadors, in the name of all the people of Campania, So freely surrender and give up our selves, our City Capua, our Fields, Temples, together with all that we have, both divine and humane, into your power, O Conspirit Fathers. And some people we may read of, who have offered themselves to the Romans upon condition of protection only, and have been rejected: as the Edesites, and the Samnites. And if so; what then should hinder, but that some people may in like manner surrender all power and right over themselves to some one man, by whose wisdom and power, they expect protection? Also it may so happen, that a man having vast possessions, will not admit of any to inhabit his Country, but under condition to submit to his Jurisdiction: or, It is possible, that a man having large Territories, and a multitude of servants, may manumit them, giving to each a proportion of Land, on condition, that they yield him their subjection with some kind of Tribute. Precedents of this nature we want not; Tacitus Speaking of the Germans, faith, That every nation hath his several bonds, and peculiar estate, and governs his own Family: his Lord imposing upon him what proportion of Cows, Cattle and Cornem he pleach, which he readily pays, and as a servant, lutheres, obey. Add hereunto what Aristobule observed, That fome men are naturally servants; that is, so apt for servitude, as if Nature had made them for no other life: and so are fome people too of so servile a disposition, that they know better how to obey, than how to govern; such were the Cappodocians, who told the Romans plainly, when they offered them Freedom, that they could not live without a King. So PhiloGrunus in the Life of Apollonius. It is but folly to set at liberty the Thracians, Scythians and Getae, for they value it not. Besides, there were not a few people who have been persuaded to admit of Kingly Government by the example of other Nations, who for many Ages have been observed to live very happily under it. Seneca speaking of Brutus, faith, Though he were in other matters a gallant man, yet in this he seemed to me to err, Not to have behaved himself like a Stoick; That he was either afraid of the Name of a King, when the first Form of Government is that which is under a good King: Or hoped for Liberty herself, where the rewards due to Empire and Subjection were so great: Or that he could believe it possible to recall the Primitive Government, unless he could restore the Citizens to their ancient Manners: or that he could reduce them to an equality of Civil Rights, and put in force their ancient Laws, when he saw so many thousands of men to fight, Not utrum servirens sed utri, Not whether they should obey or not, but whom they should obey. Some Cities, faith Livy, were so well pleased with the Government of Lumenes, that they would not have changed their condition with the Free Cities in the world. The like is recorded by Hierocles, That many delivered the Free Cities of Greece, to live in Salamines a City in Cyprus, under the Mused Government of Evagoras. Again, such may be the condition of a City, that there remains no probable hopes of safety, unless they put themselves under the Dominion of one single person. Such was the State of the City of Rome, which most wise men thought could not have been preserved, had not Augustus Caesar allowed to himself the sole Government of the whole Empire. Such cases, I say, not only may, but usually happen, as Cicero observes in the Second of his Offices: But (as hath been already said) like as private Dominion may by a just War be lawfully acquired, so also may Civil Dominion, or the right of Empire, if it depend not upon some other. Nor would I be thought to speak this of Monarchical Government only, where that is received; but the same Arguments will hold for the acquiring of an Oligarchical Government, where the Nobles have excluded the Commons, and allowed the Government upon themselves. What, that there is any common wealth so popular, wherein some, as the poor, the strangers, women and youths are not excluded from publick Counsils? Even now there are some people also that have others truckling under them, and who are no less subject unto them, than they could be unto Kings. Whence ariseth that Queslion in Livy, Are the Citizens people under their own Jurisdiction, or have they any power that is their own? And the Campaens when they surrendered themselves unto the Romans, are said to be under the Jurisdiction of the Romans. Armenia is as also Aphyileia are said to be subject to the Atheticans: so are Persan and Ganni to the Dominion of the Rhodians. The Emperour Otho gave all the Cities of the Moors to the Province of Granado in Spain, as Tacitus testifies: So did Philip the City Bydha to the Obyphians. Many other examples are here produced, all which were absolutely Null, if it be granted, That the Right of Government be at the disposal of them that are governed. Again, some Kings there are, that are not subject to the whole body of the people, as Histories both Sacred and Prophanke do testify. If thou shalt fail, saith God to the Judges, I will set a King upon thee, Deut.17. 14. And unto Samuel faith God, Show them the right or manner of the King that shall reign over them, 1 Sam. 8. 4. The like we may read, 1 Sam. 9. 16. and 1 Sam. 10. 1. It shall be super eos; not under my people, but over them: not under them, to serve them; but over them, to save, defend and deliver them. Thus David and Solomon are said to be anointed over the people,
people, over the Lords appointed, and over Israel. And David gives thanks, that God had subdued his people under him. Christ also declares as much, where he faith, The Kings of the Gentiles exercise dominion over you, Luke 22. 25.

The Power of Kings are Subjects is their own: But none can Kings command, but God alone.

The three Forms of Government are by Secrecy thus described: Sometimes the people are to be feared, sometimes, if the Government be such, those must in favor with the Senate, and sometimes, those particular persons upon whom the whole power of the people, and over the people is devolved. For such, faith Plutarch, have power to govern, not only according to the Laws, but even the Laws themselves for the public good. Thus Octavius in Herodesotus describes a King, That he may do even what he will, without being accountable to any. So doch Dion \textit{Philoquis}, That he may so rule, as not to render an account to any. \textit{Panathens} to the \textit{Meechans}, oppose Kingly Government to that which is liable to give an account of his Acts to others. \textit{Aristophanes} affirms, That there are some Kings who are invested with as much power as elsewhere a whole Nation hath over itself, or whatever it hath. So, as soon as the Roman Generals began to allume unto themselves Regal power, the people are said to con- fer upon them all their power and authority over themselves, as \textit{Theophrastus} expounds it. Hence is that excellent saying of \textit{M. Antoninus}, None but God himself is the Judge of Kings.

\textit{Dio} \textit{Philoquis} Speaking of such a King, faith, He is free and absolute in power, both over himself, and over the Laws; what he will, he doth; and what he will not, he doth not. Such an- ciently in Greece was the kingdom of the Inachide at \textit{Argis}, whom \textit{Moses} terms the \textit{Anakims}, Deur. 2. 10. For the \textit{Argives} in \textit{Aeschylus} thus befitheak their King; Our State and City is in thee,

\textit{Themistocles} tells us, what a King should do, so \textit{Samuel} tells us what a King may do; \textit{Moses} tells us his duty, \textit{Samuel} his power. The Law consists of two distinct parts, the one Direct, the other Coercive: the former points at the rationality of the Law, the latter at the danger we run into, if we break the Law. Now Laws serve to direct kings, because they mind them of their duty: But they have no power to force them to that duty, much less bid the King them if they do it not.

\textit{Dionysius} himself, though a King, speaks in \textit{Euripides}, concerning the Common-wealth of Athens,

\begin{itemize}
\item Athens being Free,
\item Enslaved by any one disfains to be;
\item The People there are Kings, who Annually
\item The Government to this, or that decree.
\end{itemize}

Much different from what \textit{Theoquina} himself, though a King, speaks in \textit{Euripides}, concerning the Common-wealth of Athens,

\begin{itemize}
\item Some live
\item for awhile the power,
\item but not the name.
\end{itemize}
his power over the whole body of the people. And such was the power of the Dictators in Rome, from whom there was no Appeal, no not unto the People; whence it came to pass, that as Livy informs us, An Edict from the Dictator was as Authoritative as an Oracle from God: Neither was there any Safety at all but in obedience. For though Kings were banished, yet was the Regal Power comprehended in the Dictatorship.

The Arguments produced for the contrary opinion, are easily answered: For in the first place, Whereas they say, The Thing that constitutes is greater than the Thing constituted; and therefore the people that make the King, must needs be greater than the King they have made: Lanier, That it is true, where the Authority of the thing constituted doth always depend on the will of the Constitutors; but not where the Authority once freely given, doth ever after fully remain in the person that received it. As for example, A woman being free, may chuse whom the will for her Husband; but having once chosen, the woman is perpetually bound to obedience: (So he that relieves to put himself as an Apprentice, hath a freedom to chuse his own Master; but having consecrated, cannot free himself when he pleareth.) It was well said of Valentinian, who being first chosen Emperor by the Army, and afterwards denying them a request, which seemed unto him unreasonable, told them, That it was indeed in their power to have chosen, or not to have chosen; but being chosen, what ye demand is in my power to grant, but not in yours to exact: It is your duty to obey, and mine, being your Emperor, to consider what condueth to the General Safety. Neither is it altogether true, what they seem to take as granted, that all Kings are constituted by the people; as may easily be proved, as well by some Fathers of Families, who admit of Strangers under the condition of Subjection, as of some Nations conquered by the Sword.

Another Argument they draw from, that maxim of Philosophers, That all Government is granted for the benefit of the people, and not of the Governors; and therefore the end being more noble than the means, they for whole good Rulers are constituted, are above the Rulers themselves. But neither is this universally true, That Government is for the good of the perfons governed; for some are for the sole use of the Governments, as that of a Master over his Servant, is chiefly and principally for the good of the Master; but the good of the Servant is but extrinsic and adventitious, as the Physicians gain is but accidental to the Physick he gives. There are also some Governments that are for the mutual benefit of both parties, as that of an Husband over his Wife: So of Empires, some are gained by the Sword, and those doublets are for the benefit of the Conqueror; neither is it therefore to be accounted tyrannical, which word (as now taken) implies somewhat of injustice: And some Empires are for the mutual good, both of him that governs, as of them that are governed; as when Alexander was made King to defend the oppressed Gileadites. Yet notwithstanding I cannot deny, but that in modern Empires, what was long since said by Hesiod, Herodorus, and Cicero, is very true, That Kings are constituted to administer Justice to their people. But to infer from thence, that the people are above their King, will be no good consequence; for the Guardian is appointed for the good of his People, and yet hath he a right and a power over him. But you will farther say, That in case a Guardian perform not his duty he may be removed, and why then may not a King? Whereunto Lanier, That the case is not the same, for a Guardian hath a power above him, by whom he may be judged, but so hath not a King; for that there may be certain bounds set to all humane power, it is necessary that we admit of one to be Supreme; and That one must be either a single Perfon or an Assembly, unto whom are referred the last Appeals; whose faults because they have no Superior upon earth, God himfelf is said to punifh: And if he do not, yet is that very toleration intended, either as a punishment or as a Tryal of the People. It was excellent advice that Tacitus gives in this case, The luxury and covetousness of Princes, to be endued with the self same necessary patience, as we do storms and tempests at Sea, or droughts and scarcity by Land, or the like natural inconveniences which are not to be avoided: For vices there will be as long as there be men; but this is our comfort, that as they are not perpetual, so they are sometimes recomposed with great advantages. It was well said of M. Aurelius, That if private persons offended, the Magistrate is to judge; If the Magistrate offend, the Prince: But of Princes God alone is the proper Judge. Thus doth Virgins (being himself a King) plead in Cæsiodore, in the behalf of Kings, Cæs. Regia passa nisi superius effe applicanda Judicata quodquidem illa è colo petita est, & soli colo debet innocentiam: The miscarriages of Princes are to be referred to God's Tribunal, for receiving their power from Heaven, to Heaven alone they owe their innocence. And presently after he subjoyns, Neither can we be accountable to any other, because upon Earth we have no Judge, nor within our Dominions any Peers. Another notable place we have in Gregorius Turinensis, where he (being a Bishop) thus bespeaks the King of France, If any Subject deal unjustly with us, it is in thy power, O King, to punish him: But if thou opposet us, who shall judge thee? We may complain unto thee, and if thou wilt, thou mayst hear us; but if not who, shall condemn thee, but he only that is Justice itself? Among other
other opinions of the Ephesians, Porphyry commemorates this, That Empires fall not to any man by chance, but by the special providence of God. Cujus jus haec hominum natus est, his jus regum conferregitur, opti is quis in illis temporibus ab ipsis regnans. Look, Faith Irenus, by whose providence it is that men are born, by that the Kings are ordained: Not by chance or peradventure, but by God's special appointment; as being fitted for such times, in which, and for such persons, over whom they were to rule. According as it doth best advance those great deligis of Gods, who ordained the Cujus Articles to be the hard fact of his Kings to manifest his power in him, Exod. 9. 16. Rom. 9. 17. Thee were the several thoughts of the Egyptians themselves, as Didymus observed, Exs. 16. non diversa providentiae persenitit Reges ad summan omnium potestatem; They were fortifie
dated, that it is not without a divine providence, that Kings ascend to the highest power. So St. Augustinns, He that gave the Roman Empire to Augustus, gave it afterwards to that multitude of men, Nero. He that filled the same Empire in Vespasian and his Son Titus, did afterwards transfer it on Domitian. That Confination of Clemens is very pertinent to this passage, Regem tempore gubernavit ad dominum eum; Thou shalt fear the King, knowing that his choice is from God: Neither will it ever avail to say, that we read of some people who have been pronounced for the sins of their Kings; for this happens, not because the people do not reflect and punish their Kings, but because they tacitly consent to their vices. Or haply without regard to this, he makes use of that supereminent power that he hath over the lives of every of his Creatures, whereby to punish those Kings by taking away their Subjects, it being the proper punishment of Kings to be thus weaken 

down another, and that transfers Crowns and Scepters from one Nation to another People, and that rules the People by whom he pleareth. Now to such as judiciously peruse the Writings of the Prophets, they will appear most evident; for they do not only forcel the Councils of Gods, but the very Kings and Princes, by whom God intends to bring about his secret purposes, are therein described, and sometimes named, long before they were born, as John by name, 1 Ktn. 13. 2. Cyrus by name, Es 45. 5. Which plainly argues, that God doth not only foresee what will come to pass, but pre-ordains such and such persons, by whom he intends to effect his purposes; yes and fits them with habits and graces accordingly. * The proper punishment of Kings is to be deprived of their Subjects.

Others there are that seem to fancy to themselves mutual subjection, as in case the King shall govern well, then the whole body of people should obey; but in case he govern ill, then he ought to be subject unto the people. Now if they say they do amount to no more than this, That our obedience to Kings binds us not to do any thing that is manifestly wicked they say no more than what all sober men will grant: Yet doth not this imply any compulsion or any right of Empire that is in the people. But in case they had a purpose to divide the Government with the King (whereof we shall have occasion hereafter to speak somewhat) they ought to assign bounds and limits to the power of either party, which may easily be done by making distinction of either Places, Personis, or Affairs. But the well or ill management, especially of Civil Affairs, being apt to admit of great debates, are not fit to dishonour the parts; for great confusions must necessarily arise, where the right of power is to be judged of by the pretensions of good or evil acts, some judging of these Acts in favour to the King, others in favour to the people; which confusion no people, that has yet known, were ever so imprudent as to introduce.

These errors being thus refuted, It remains that we set down some Cautions, which may guide us to give a right judgment, to whom in every Nation the Supreme Power belongeth; whereas the first is this, That we suffer not our selves to be deceived by such names as are ambiguous in sense, nor with the shew of outward things. As for example, Although amongst the Latins, a Kingdom and a Principality are usually opposites; as when Caesar said, the Father of Verecundus having got the principality of Gallia, was slain for his affecting the Kingdom: And when Piso in Tacitus said, that Germanicus was indeed the Son of a Prince of the Romans, but not of the King of the Parthians. And when Suetonius said that Caligula wanted but a little of changing his Principality into a Kingdom; yet we find these Titles of times promiscuously used. For both the Macedonian Generals, who derived themselves from Hercules, though afterwards they were subjected to the Ephori, yet were still called Kings. And some ancient Kings of Germany there were (as Tacitus relates) who Reigned, magis iudendi quam judicandi potestate; more by perfuasion, than by power. And as Livy speaks of King Evander, that he governed rather as a prudent Magistrate, than as a King. Thus Salomon calls 2Sam. the King of the Carthaginians; And he that wrote the Life of Hannibal faith, That as the Romans chose every year two Consuls, so the Carthaginians chose two Kings, (meaning their Suffetes or Judges.) Among these Kings, improperly so called, we may likewise reckon their Sons, whom their Fathers were pleased to honour with the Title of Kings, though they referred unto themselves the Regal Power. Such was that Darius, whom his Father Artaxerxes commanded to be killed, being first condemned for plotting his Fathers death, as Plutarch relates the Story. So on the contrary, The Roman Emperors, after they had openly allumed unto themselves Regal Power, contented themselves with the Names of G and
and titles of Generals or Princes. Nay, the Ensigns of Regal Power are in some Free Cities usually given to Princes. But now the assembly of States, that is, of those that represent the whole body of the people, digested, as Gunkler speaks, into three orders, namely, Prelates, Nobles, and the Principal Burghers of Cities, do in some places indeed serve to this end only, to be the Kings Greater Council, whereby the grievances of the people, which are oft-times concealed by his Privy Council, may come to the Kings knowledge, who have also power to determine them, as it shall seem good unto them, according to Custom. But in other places they have power to call into question the Actions of the Prince, and also to prescribe Laws which shall be binding even to the Prince himself. There are many also that place the difference between the Supreme and the Lesser Powers, in the translation of the Empire by Election or Succession: Attributing the Supreme Power to this latter, but not unto the former. But this holds not universally true: For Succession assigns not the Form of Government, but the Continuation of a Form in the same Family. For the right which began in the Election of such a Family is by Succession continued. Among the Lacedaemonians the Kingdom, even after the Ephors were constituted, was hereditary: And of such a Kingdom or Principality it is that Aristeotle speaks, where he faith, That some pass by the right of Blood, and some by Election. And such in the time of the Ancient Heroes were most of the Kingdoms of Greece, I mean successive; as both Aristotle and Thucydidès observed; so doth Dionysius Halicarnassensis. Whereas on the contrary, the Roman Empire, even after all power was taken as well from the Senate as people, was always transferred by Election.

A Second Caution shall be this, It is one thing to enquire concerning the things, and another to enquire concerning the manner of holding it, which holds good not in things Corporeal only, but in things Incorporeal. For as a Field is a Thing, so also is a Paffage, an Act, or Way. But these same may have by a full right of propriety, others by a right usufructuary (as a Farmer hath a right to his Farm,) and some others by a Temporary Right: As the Roman Dictator the Sovereignity but by a Temporary Right. So Kings, as well those that are first elected, as also those that succeed to them in a right line, hold their Kingdoms by an Usufructuary right; (that is, they hold them as to all the rights and profits, but not to alienate them.) But others hold their Kingdoms by a full Right of Propriety, as they that by a just War have conquered them: Or he to whom any people, to prevent greater mischief, have yielded themselves Subjects for protection, so as they reserve nothing unto themselves. Neither do I agree with those who hold that the Roman Dictator during his time could not have Supreme Power, because it was not perpetual. For the Nature of all Moral things are best known by their operations: Wherefore those powers that have the same effects are to be called by the same name. But a Dictator during his time, exerciseth all Rights that a king doth, who holds his Kingdom by a full right. Neither can any Act of his be made void by any other, as may appear by the Case of Fabius Rutilianus, whom when the people would have preferred, they could deal with the Dictator by no other means but by Petition: Whence we may conclude, That he had the same supreme power. Now the Duration or Continuation of a thing alters not the nature of it; yet if question be made concerning the dignity which is usually called, Majesty: Doubtless, he that hath it perverted unto him hath the greater Majesty, than he that hath it for a time limited only; because the manner of holding it adds much to the Dignity of him that holds it. Now what hath been said of Kings, may also be said of such as are, either during the Minority of Kings, or during their Captivity, or Lunacy, appointed Protectors: For neither are those subjects unto the people, nor is their power revocable before the time come, appointed by the Laws. But it is otherwise with those who have a Right which is at any time revocable: As they who reign only during the pleasure of others, such was the Kingdom of the Vandals in Africa, and of the Goths in Spain, who were as often deposed as they dis pleased the people. And every act of theirs might be made void, because they who gave them that power, gave it under condition of Revocation: And therefore not having the same effect, they could not be said to have the same Right.

Against what I have before said, That some Kingdoms are held in full right of propriety, that is, as Patrimonial: There are very learned men that make this objection, That men being free, are not to be traffick away from one to another, (as things that are bought and sold:) But as the power of a Master is different from that of a King; so is personal liberty from that which is Civil: And the freedom of singular persons, from the freedom of States. The Stoicks themselves confess, That there is a kind of servitude in subjection, and the Subjects of Kings are sometimes in Holy Writ called their Servants: As personal liberty excludes the power of a Master, so also doth civil liberty that of Empire, and all manner of Sovereignty properly so called. Livy thus opposeth them, Before men had tasted the sweetness of liberty, they defined a King. And again, What a shame is it for the people of Rome, who when they served under
under Kings, were never strained by War, nor besieged by an enemy, being now a free people to be besieged by the Hetrulians. And in another place, 'The people of Rome live not now under Kingly Government, but in liberty.' And elsewhere he opposes those Nations that were free, unto those that lived under Kings. So also Seneca the Father, 'We ought not to give our opinions in a Free State, in the same manner as we did under Kings.' Yea, and Cicero, 'Either we did not well to expel Kings, or we ought to restore the people to liberty, not in words only, but in deeds.' After these comes Tacitus, 'The City of Rome, faith he, was at first governed by Kings, but it was L. Brutus that instituted Liberty and Conspiratory Ambitie. And to be short, very much among the Roman Laws, when they treat of War and recuperative Judgments, all Foreigners are distinguished into Kings and Free People. The question then here put, respects not personal, but civil subjection. In which sense, some Nations are not said to have power over themselves. Hence is that in Livy, 'Which Cities, Fields, and Men were sometimes under the power of the Abolians. And that all, Are the people of Collatia a free people? (i.e.) have they any power over themselves? Nevertheless, to speak properly, when any are said to be alienated, it is not the men, but the perpetual right of governing themselves, as they are a people, that is alienated. As vain and frivolous is that Inference, which concludes, That because Kings conquer Nations by the blood and sweat of their Citizens, therefore what is so conquered, ought of right to belong rather to them than to him: For possible it is, That that King may pay his Army out of his own private estate; as M. Anthony did in his Bohemian Wars, when the Roman Treasury was exhausted, being unwilling to impose any more Taxes upon the people, brought into Trajens Court, and made sale of all his Vessels of Gold, Silver, Crystal and Myrrh, together with his own and his wives Robes of Silk and Gold, and all their own Ornaments and Jewels for the maintenance of the War. Or he may pay his Army out of the rents and profits of that Country which attends the Principality: And therefore Ferdinand claimed to himself all that part of the Kingdom of Granada, which he had gained, with the rents and profits he had raised out of Cadiz, during the time of his Marriage, as Mariana testifies. For although a King have but the mean profits arising out of that Patrimony, in the same manner as he hath the right of governing the people who have elected him, yet are those profits properly his own. As it is in the Civil Law, where though the Inheritance be judged to be restored, yet the profits are not, because they are perceived, not from the inheritance, but from the thing itself. Possible therefore it is, that a King may be so possess of the Government over some people in his own proper right, that it is in his own power to alienate it. As it was granted to Baldwin, by those that accompanied him in his expedition to the Holy Land, That the half of all the Cities, Provinces, Tributes and Prizes that should be taken in that War, should be his. Strabo tells us, That the tale Cytherius lying against Tenariu did belong to Euryclus, one of the Macedonian Princes, in his own Right. So we read that Solomon gave Hiram of Tyre twenty Cities, not of those that belonged to the Hebrews: For Cabot (which was the name impofed on those Cities) was seated without the Hebrew bounds, Josh. 19. 27. But of those, which the people that were enemies to the Jews, had held till the days of Solomon, and were partly conquered by the King of Egypt, and given unto Solomon in dowry with his daughter, and partly conquered by Solomon himself. For that these Cities were not at that time possessed by the Hebrews is evident from this, That as soon as King Hiram had restored them to Solomon, he then planted in them a Colony of the Jews. So we read that Hercules gave the Kingdom of Sparta which he had conquered by arms, unto Tiradanes, on this condition, That if Hercules should have any children of his own, he should ref tore it to them: And having conquered the Epirots, he gave them to Apollo. So we read that Agamemnon King of Doris, having called to his assistance Hercules, in his War against the Lapithes, gave him a part of that Kingdom as his reward. Cyprian King of Salamine, having no children, left his Kingdom by his Testament unto Teucer. Amphipolis was given in a Marriage dowry to Actamante, the Son of the Hero. And in Homer, Ajaxamnon promiseth to give unto Achilles seven Cities. So King Alcacercaus freely bestowed two parts of his Kingdom upon Melampus. So again in Homer, we read that Joveus gave his daughter to Bellerophon, with a part of his Kingdom in Dowry. And Jafin tells us, That Daris bequeathed by his Testament his Kingdom to Arexerxes, but the Cities whereof he was governor only, to Cyrus. And probably it is, That the Successeors of Alexander every one for his part, did succeed him in that full Right of Governing the Nations, which were either formerly under the Persian Empire, or which they after wards gained, by the right of their own Conquests. And therefore it is not to be wondered at, that they claimed unto themselves the Right of Alienation. So when King Attalus the Son of Eumenes, had by his Testament made the people of Rome heir to all his goods, they under the name of goods, possessed themselves of his Kingdom, whereof L. Florus speaks thus, 'The Word, Heir, implying an Inheritance, the people of Rome held his Kingdom as a Province, and not as gained by War, or by force of Arms.' But Liv. 52.
of the Soveraign Power.

BOOK I.

Of the Soveraign Power.

Ost. 2. 2
Fallam.

Epist. Lib. 2. 1. 43.

Act. 1. 41.

Bajateh.

Preclisis.

Letteratus, lib. 2.

Plan. Lib. 4.

by what was yet more righteous, by a Testamentary Right. So when afterwards Nicomedes (the King of Bithynia dying) made the Romans his heir. They presently reduced his Kingdom into the form of a Province: Whereof Cicero thus, We have added to our Inheritance the Kingdom of Bithynia. So that part of Libya, wherein the Cities Berenice, Protorama and Cyrene stood, was by King Appius given by Testament to the same people.

And Tacitus makes mention of some Fields, which belonging formerly to King Appio, were by him left together with his Kingdom, to the people of Rome. Procopiuslikewise tells us, That King Abaces by his Testament divided the Kingdom of Armenia, leaving the greater Armenia to Araxes, and the lesser to Tigranus. And it was he, That King Herod having obtained from Ang. Cesar a Power to leave his Kingdom to which of his Sons he pleased, was often observed to alter his Testament. This custom also was much in use amongst the Goths and Vandals, in those Kingdoms which they held by Conquest. The same we may observe much practised among the Turks: Sultan Abn- abide bequested by his Will many Cities to Ofman; Bajazet also gave diverse of the Cities of Servia to Stephen, in favour to his own Wife, being Sitter to Stephens. Sultan Mahomet bequested his Kingdom by his Testament to Sultan Morat: and Mahomet the Turk intended to have divided his Empire, and to have left the Afile Empire to Musul- phus, and the European to Amurat. This also was frequently used in many other Nations. To refresh them all would be no less troublesome to me, than it would be tedious to the Reader. But these may suffice to prove, That where Kingdoms are held by a full and absolute Right, they may be alienated: Yet so, That though the Right of Empire may be transferred, yet both every singular person enjoy his own Liberty.

In those Kingdoms wherein the people have any power, by way of Election or Confirmation, I confefs it cannot be presumed, That it was ever their Mind to suffer the King to alienate his Kingdom. Wherefore what Transtibus observed, in Origines, as an Act without any Precedent, That he had by his Testament given away Norway, we ought not to disapprove: For haply he regarded only the Customs of the Germans, amongst whom there was no such Right permitted, as to bequeath Kingdoms. For as Tacitus was by Tacitus faith, Empires cannot be bequeathed, as goods and bonds-flaves may. Nor can a King, as Salian observers, by his Testament, bequeath the people whom he hath go- verned, to the poor. Now whereas Charles the Great, Lewis the Good, and others afterwards among the Vandals and Hungarians, are said to dispose of Kingdoms by their Testaments: These afforded rather matter of praise among the people, than argued the force of a true Alienation: And as to that of Charles, Ado makes special mention, that he defined his Testament might be confirmed by the Peers of France. The like we find in Ligy, concerning Philip King of Macedon, who endeavouring to expel Persia out of his Kingdom, and settle Angiormis his own Brothers son in it, went through the Cities of Macedon soliciting the Princes on his behalf. Neither is it to the purpose to object, That the same Lewis restored the City of Rome to Pope Pashal: Conceiving that the French having before received the Sovereignty over that City from the people, might well restore it again to the same people, in the person of the Pope, being their chief Ci- tizens, and a Prince of the first order.

What we have hitherto admonished, namely, That we are carefully to distinguish between the Supreme power it self, and the manner of holding, it is so true, That as many Soveraign Empires are not held by a full and absolute Right; so there are many that are not Supreme, that are fully and completely held: whereby it falls out that Marquises and Earldoms are much more easily either fold or bequeathed by Testaments, than King- doms are.

There is also another mark whereby this distinction may be seen, namely, in the Tuteledge or Protection of Kingdoms, when Kings and Princes are hindered or disabled either by some disease, or through old age, or the like, from performing their duty. For where the Kingdom is not Patrimonial, the Protectorship is theirs to whom the publick Laws, or if they are silent, the people shall confign it. But if the Kingdom be Patrimonial, then to them whom the Father, or the nearest of kin shall chuse. Thus did Philomel King of Egypt, appoint by his Testament the people of Rome as Guardians to his Son, who performed that trust, being M. Emilianus Lepidus who was their Chief Priest, and had been twice Consul, unto Alexandria to take care of the Government, and of the Child's Education: By whose care, not only the Kingdom was preserved, but also the Child in his youth so well discipul'd, that it was hard to judge whether he received more glory by his Father's great fortunes, or by the Majesty of his Guardian. So we read that in the Kingdom of Epirus, which first depended on the suffrages of the people, Tutors were publickly assigned unto their young King Aribas: The like was done by the Nobility of Macedon to the Posthumous son of the Great Alexander. But in Afa the Lector which was gained by the Sword, King Eunomus dying, appointed his Brother Protector to his young son Attas. So did Hiero King of Sicily, by his Testament confign unto his son Hieronymus what
what. Tutors or he pleased. But whether the King be also in his own private right Lord of the
toil, as the Kings of Egypt were after the times of Josiah, or as the Kings of the heu-
net were, as Diedorus and Strabo tell us; or whether they are not, it makes no difference.
for these are extrinsic to the Empire, and therefore can neither constitute another
kind of Government, nor alter any thing as to the manner of holding it.

The third observation shall be this. That an Empire cannot not to be supreme, though
he that is to govern do by promise oblige himself either to his Subjects or to God, unto
such things as do properly appertain unto his manner of Government. I mean not here,
such things as appertain to the Laws of God, Nature, or Nations: For unto these every
Prince stands obliged, though he promise not: But I mean though he do promise to
confine his own power within certain Laws and Rules, whereunto nothing can bind him
but his oath or promise. The Emperor Trajan did solemnly imprecate vengeance on
his own head and right hand, in case he knowingly failed in what he had promised.
And the Emperor Adrian likewise, that ye would never punish a Senator without a decree
of the Senate. Anastasius bound himself by oath to obverse the decrees of the Synod of
Chaledon. And all the Greek Emperors did likewise oblige themselves to obverse the
Canons and Constitutions of the Church. But by none of these Oaths or Promises
doth the Power of an Emperor cease to be supreme. This may clearly be illustrated
by comparing the power of a King with that of a Master in his own Family: For although
a Master do promise to obverse such orders as he conceives to be most conducing to the
welfare of it; yet doth he not thereby cease to be supreme in his own Family. Nor doth
a husband cease to have power over his wife, though he have obliged himself to
the contrary by some promises that he hath made to her: yet I must acknowledge that
where such Oaths and Promises are made, the sovereignty is thereby somewhat straitened;
whether the obligation do only restrain the exercise of the Act, as that of Adrian's above-
mentioned, or the very power it itself. If it restrain the exercise only, then the Act that is done
contrary to promise, is laid to be unjust: because as we shall shew anon, every promise gives a
right to him to whom it was made. But if it restrain the faculty itself, then the Act
will be void, for want of a Right or Faculty to do it. And yet will it not necessarily
follow, that he that thus promiseth hath any power superiour to himself; for his Act is
not made void by any power above him, but by very right. Among the Persians no man
can say but that their Kings were supreme and absolute in power, and not liable to
have an account; as Plutarch testifieth: Nay their Kings were adored as Gods Only; and as
Justin tells us, were never changed but by Death. He was a King indeed, that laid
to the Nobles of Persia, Ne vividero meo tantummodo nusus, nisi contraxi; etiam, me-
memore parentem volo, magis quam justandum: Last I should be thought to govern by mine own
counsels only, I have called you together, but otherwise remember, that it is your duty rather to
obey, than to permuse. And yet did this very King at his Coronation swear not to alter
the Laws of that Kingdom made after such a form, as both Xenophon and Diodorus testifi-
ifie: and as the Histories of Daniel, and Plutarch in the life of Themistocles inform us.
So Josaphus tells us, That Vahhi could not be reconciled to the King because the Royal
Decree was gone out, which could not be broken. And long after them, Procopius con-
firms as much, where we may read a notable example to this purpose. The very same
doth Diedorus Siculus relate of the Kings of Achæonia and Egypt, who without doubt,
as all other Eastern Kings, had in their respective Kingdoms absolute Power: and yet
were they all at their admission obliged to many things by Oaths or Promises: Which if they
were performed not, though while they lived, they could not be questioned: yet being
dead, their memories might be accused, and being condemned, their carcasses might
be denied folemn Funeral. This Apion records, Leges Tyrannorum Corpora insepultae ex-
tra fines proiecti juraunt; The Laws, faith he, command the bodies of Tyrants to be cast out of
their Territories unburied. In obedience to the like Law, the Emperor Aemilius de-
prived his own Father Michael of Christian Burial, because he followed the Faith of the
Latin Churches. And such another Law there seemed to be amongst the Hebrews, who
would not permit the dead bodies of their wicked Kings to be inter'd among their good
Kings. The like we may find in Josaphus concerning the two Forums, the one King of
Judah, the other King of Israel. By which excellent temperament of reverence and jus-
tice, they both preferred the Majesty of their Kings inviolable whilst they lived, and
also deterred them from breaking their oaths and promises by the fear of a dishonoura-
able Interment, being dead. The Kings of Egypt were wont to make oath, That they
would rule according to the Laws: And their Subjects likewise bound themselves by
Oaths to defend both him and the Kingdom according to the same Laws; as Plutarch
forms us in the life of Pyrrhus. Nay further, suppose a King should accept of his King-
dom upon these terms, That in case he should fail in his promise, he should lose his King-
dom; yet were his power supreme only, the manner of holding it would be so much
impaired by such a condition, as would make that Government not much better than
that

XVI.

Soeverignty nor lost by any promise made of any things which belong not to either the
Law of God or Nature.
that which is Temporary. It was said by Agatharchides, concerning a King of the Sal-myant, that he was not liable to give any account of his Actions as King, and yet if ever he were seen out of his own Palace, he might be stoned to death justly: Which Strabo also notes out of Artemidorus. So that Land which is held upon condition of some Truth to be performed, is held as fully during the performance of that Truth, as that which is held absolutely. But yet it is possible that it may be lost, and such a condition Law may be added, not only in conferring of a Kingdom, but in any other Contract. For some Leagues with our Neighbour Princes we see enter into under such penalties. As in case a King being at his admission sworn, shall break his Articles of Agreement, his Subjects shall not help him, no nor obey him. So Cremnus testifies in his Treatise concerning the affairs of Palamid, Ch. 19. & 21.

XVII. It may sometime be divided.

Vid. Gai. lib. 2. Off. 137.

To command argues a superior, but not to compel.

XVIII. Which is ill collected from this, That some Princes will have their Acts confirmed by the Senate.

True it is, that some Kings will not permit that some Acts of theirs shall be of force, until they are confirmed by the Senate or some other Commissioners. Yet he that shall hence infer, That there's a Partition of power, will be mistaken: For whatsoever Acts are thus rcfnied, ought to be understood as though they were made void by the King himself, who by this means provides, that nothing fraudulently gained from him shall pass to his disadvantage. This was the scope of that Refcript sent by Antiochus the Third to his Magistrates, That in case he commanded them to do anything contrary to Law, they should not obey him: And of that of Conflavus to his, That Widows and Orphans should not be compelled to come for judgement to the Court of the Emperor, although the Empueous own Letters should be produced for it. This is very like unto those Testaments unto which this clause is added, That no Testament hereafter to be made shall be of force: For such a Clause would have it believed, that the latter Testament proceeded not from the will of the Testator. But as that clause in the Will, so the first Act of a Prince may by any after-Act of his, or by any special Indication of his latter Will, be easily rcfnied.

Neither
Neither am I at all swayed by the authority of Polybius, who would fain have the Romans to be a mixt Common-wealth; which if we regard not so much the Acts themselves, as the Power whereby they were done, was doublets at that time, meerly popular: For as well the Authority of the Senate which he refers to Optimacy, as that of the Confuls, which he refers to Monarchy, were both of them subject to the power of the people. Now the self same may be said, in answer to all other the Opinions of those that write of Politicks, who haply think it more agreable to their purpose, to gaze on the extern face and daily administration of the Soveraignty, than unto the very Right of it, it self.

Much more pertinent to the matter, is that of Aristotle, who faith, That between a full and absolute Monarchy, and that like unto the Leonian, being but a meer Principlality, there are some of a Mixt kind; whereof we have an example, as I conceive, in the Ais-kiips Kings, who doublets in molt things governed by a full power. For such a King the people required, as their Neighbour Nations had: Supposing, as Josephus tells, That if they were governed like unto their neighbours, they would suffer no Inconveniences: not considering, that all the Eastern Nations, except themselves, were under a Slavish Government. So Aylfia in Asschylus, speaking to the Persians of their King, faith, That he is not accountable to the City for what he did. That of Virgil is well known,

Nor Medes, nor Parthians, thus their Kings obey.

Livy gives this Character of the Syrians, and all the Asin People, That they were a kind of men born to be Slaves. Not much unlike is that of Apollinis in Phisofavanaugh; The Alyrians and Medes do adore their Kings; nor that of Aristotle, All the Aliens do patiuntly submit to Monarchy. And to the fame fenfe is that Civilis Batarius to the Gauls in Tacitus, The Syrians and Aliens might well serve, because all the Eastern nations were accustomed to be governed by Absolute Monarchs. Not but that there were not even at that time Kings also both in Germany and France; but as the fame Tacitus there observes, They were such as governed for the molt part in a Precarious way: or as I saied, more by a Perwaftive, than by a Coercive Power. We observ'd before, that the whole body of the people of Israfel was under their King. And Samuel describing the Government of Kings sufficiently proves, That against the Injuries done by them, there remained no power at all in the people, either to reft, or revenge. Which the Ancients did rightly gather from those words of King David, Thifi foli peccavi, Unto thee only have I sinned; because as St. Hierom upon that place glosseth, David being a King, stood in fear of none but God, as having no other Judge but him: So likewise St. Ambrose, David was a King, and so subject to no Laws: For Kings are free from those shackles, wherewith their Subjects crimes do entangle them: They fear no punishments, being secured by the power of the Empire. To Man therefore he sinned not, because to him, he was not accountable for his Actions. Apposite to this, is that of Vitiges in Cafliodore, Caufa regis potestatis supernis et applicanda judicis, quandoquiem illa soli celo petiit eft, ita soli celo debet innocentiam: The cause of a King is to be referred to Gods Tribunal: for from whence he derives his power, to him only he owes his Innocence. And in cafes of such oppressions, God himfelf prefcribes the only Remedy that the people can have against their Kings, namely, Prayers and Tears; And ye shall cry out in that day, because of the King whom ye have chosen, 1 Sam. 8.18. (He doth not encourage them to Rebel, nor doth he prescribe any Legal way of proceeding against them; only they may cry unto the Lord, and if he heard them not, they must suffer with patience. Nor doth Samuel infinuate this to the Jews as if it were inudum futilum: that is, That Kings abusing their power would do so; but as if it were fius Regiun, a Right proper to Kingly Government to do so.) The Jews themselves grant, that if their Kings did transgres those Laws which Moses prescribed unto them, they were to be beaten with Rods. But this was no reproach unto them, neither was it by compulion, but by a voluntary fucception, as a sign of their penitence: Nor was it done by any public Officer; but as he imposed it upon himfelf freely, fo he chofe whom he pleased to do it; and prescribed both the manner and measure of his own punishment. But from all Coercive punishment their Kings were so free, that even that Law of Excitiation, Deut. 25.9. because it was not without some reproach, was not in force against them. Yet notwithstanding all this, there were some Cases whereof their Kings had no Right at all to judge, but they were referred to the Great Sanhedrim, or Council of the 70 Elders; which being Instituted by Moses at Gods Special Command, continued by a perpetual Supply of Election, until the days of Herod: For which cause, they are by Moses and David frequently called Gods, and their Judgement, Gods Judgement. And those Judges are likewise said, to judge not for man, but for God, 2 Chron. 19.6.8. Nay, there is a plain and distinct mention made between the things of God, and the things of the King, 2 Chron. 19.11. where by the matters of the Lord (as the most Learned among the Jews no interpret it)
are meant, the Adminiftration of Judgement according to the Laws of God. That the
Kings of Judah did by themfelves fometimes inflict Capital punishments, I can not deny : wherein Maimondes prefers thofe Kings before the Kings of Israel : which is sufficiently
cleared by many examples both in Holy Writ, and alfo in other Hebrew Authors. But yet
the Cognizance of fome Caufes was not permitted unto them, as that of the Tribes, that
of the High Priests, that of a Prophet. For it cannot be (faith our Saviour) that a Proph 
ery pervers out of Jerufalem; Luke 13. 33. And this is evident by the Story of Jeremy,
whom when the Princes demanded to death, the King anfwered them, Behold he is in
your power; for annihly you, the King can do nothing, Jer. 38. 5. Yea, and in another place,
he that was condemned by the Sanhedrim, could not be releafe by the King himfelf.
And therefore Herod the Great, when he law he could not hinder the Sanhedrim from paffing
Sentence againft Herod, advifed him by Flight to fecure himself. In Macedonia, they that
dervied their Pedegree from Caraffus, as Caliphernes in Ariannus reports, obtained the Govern-
ment not by Force, but by Law. Now the Macedonians though they were accoutomed to Regal
Government, yet had a greater fame of liberty than other Nations. For it was not in the
power of the King himfelf to take away the life of any Citizen. It was the Ancient custom of
the Macedonians in criminal matters to be judged by the Army; but in times of peace by the
People: The Kings power availed nothing farther than his Authority reached. There is in an-
other place of the fame Author another sign of the fame mixture mentioned, namely this,
The Macedonians, faith he, ordained that according to the conftitution of their Nation, Their King
should never hunt on Foot, but in the company of some of hisfelv Friends or Princes. The
like doth Tacitus write of the Gothers, That they were under a fimpler Government than
others of the German Nation, yet not altogether without liberty. For whereas he had before
defcribed a Principality thus, That it governed rather by a Perfwative than Coercive
Power. He now defcribes a Kingdom in thefe words, When, faith he, One person rules
without any limitation or exception; and that not by entreaty, but by absolute command.
And fuppofeth upon the Sixth of Homer's Odyssey, describing the Common-wealth of Cypria,
faith, That it was a kind of mixt Government, having fomething of Kingly, and fomething of
an Ariflocratical Government. Lactanius (halocoonidas makes mention of the like Govern-
ment in Hungary and in England, in Arragon and in Navarre, where the Magiftrates are
not created by the King; nor are any Garrifons impeoned on them againft their will, nor
any thing commanded them by their King contrary to their Laws and Cufoms. Not
much different was the Government of the Romans in the time of their Kings: For
although almoft all publick affairs were then tranferred by the Regal Power. Romulus,faith
Tacitus, governed us as he pleased. And it is plain, That in the Infancy of their City, all
power was in the King, faith Pomponius; yet even at this very time, were fome few frag-
ments of that power referved in the people, if we may give credit to Dionysius Halicarn-
affifer: but if we had rather believe the Romans, in fome Cares, Appeals might be made
from the King into the people, as Seneca collects out of Cicerio's Books de Rep. as alfo out
of fome Ponthical Books, and Fenellicla. By and by after Servius Tullius being advanced
unto the Empire, not fo much by Right, as by popular Favour, did much more impair the
Majefty of the Kingdom. For to gratifie the people for their kindnefs, he ordained fome
Laws, whereunto the Kings themselves ftood obliyged. No marvel then, if Iffy puts this
only difference between the power of the first Confuls and of Kings, that it was but An-
ual. The like mixture of Popular and Ariflocratical Power there was in Rome in the
Vacancy of their Kings, and in the times of their first Confuls. For in fome things, and
fome of moment,what ever the people commanded was eftablifhed as a Law,if the Fathers
were made the Authors. But as Plutarch obferves, The People had no Right, either to
make a Law, or to command any other thing, unlefs propofed by the Authority of the
Senate. The like Mixture of Government halocoonidas notes to have been in the Com-
mon-wealth of Genova in his time. But afterwards in Rome, the power of the people
increafing, though the Fathers began and propofed, as anciently they were wont to do ;
yet as Iffy and Dionysius obferves, the people would decree what they pleafed. But yet
even after this, there remained fome of this Mixture, whilft ( as the fame Iffy speaks )
the Sovereign Power was in the Patricians, that is, the Senate ; and the Auxiliary power
in the Tribunes, i. e. the Plebeians, who had a Right to either forbid or intercede when
they pleafed. And of this mixt Government, between Democracy and Ariflocracy, Iff-
crates would have the Common-wealth of Athens to confift in the time of Soton. Now
thes of things being premifed, let us examine fome doubtful Queftions which do frequent-
ly arife about this matfer.

"The firft thing that falls under difpute, is this, Whether that Nation can be faid to have
Supreme Power that is in League with another Nation upon terms unequal? Where, by
Unequal, I do not mean, where the Confederate Nations are of Unequal power: as when
the City Thebes made a League with the Perifan Monarch in the time of Pelohipidas, or the
Romans with the Maffians; and afterwards with Maffamia. Neither do I mean fuch a
League,
League, as implies some one transient Act that seems dishonourable; as when an Enemy paying the Charges of the War, or performing some such thing, is reconciled, and becomes a Confederate. But where by the express Articles of the League there is some permanent and lasting Prelegation given from one to the other. As when one Nation is bound to maintain the honour of another; as in that League between the *Albians* and the Romans, whereby the *Albians* were bound to use their endeavours, to preserve as well the dignity, as the safety of the Roman Empire: which dignity is sometimes called the Majesty, and by *Tacitus*, the Reverence of the Empire; which he thus expresseth: Though they are separate from us in place, and live within their own bounds, yet in their minds and understanding they all with us. So likewise *Florus*, As for the rest of the Nations though free, yet perceiving the weakness of their Empire, they did highly reverence the people of Rome, being *Generosities* of so many Nations. Whereunto we may also refer some Rights due to them that undertake the Patronage and defence of others. And those Rights, the Mother Cities have over smaller Cities and Colonies amongst the Grecians. For such Colonies, faith Thucydid, enjoy the same Right of Liberty as their Mother Cities do: But yet they owe a Reverence to their Mother City, and ought to send her presents, as an acknowledgement of the honour they have for her. *Livy* concerning that ancient League of the Romans, who had received all the Rights of Alba, and of that which the Latines derived from Alba, faith, *in that League the Roman State was superior*. *Andronicus Rhodon* following *Aristeide*, did well observe, that in contracting amity between Nations of equal power, *it was but reason able, that the weaker should give the greater honour, and the stronger afford the greater succours*. *Proculus* in his Anwser to this Question we very well know, namely, That that is a Free Nation, which is not subject to the power of another, although it be comprehended in the League, that that Nation shall faithfully uphold the Majesty of the other. If therefore a Nation bound by such a Covenant, do yet remain free, and not subject to the power of another. It follows, that that Nation doth yet retain its Sovereignty; the like may be said of a King. For of a free, people, and of a King that is truly so, there is the same reason. *Proculus* adds further, that such a Clause is not to be made in the League, to declare, that one Nation is superior to another; and not to declare that the other is not free. By superior, we understand not in power, (for he had said before, that a free Nation should not subject to the power of another) but in Authority and Dignity: which the words following by a very fit Simile do clearly illustrate: For as we know our Clients to be free, though neither in Dignity, nor in Authority, nor in all Rights our equals: so they that are obliged faithfully to uphold our Majesty, are notwithstanding to be understood our equals in Liberty. Clients are free, though under the defence of their Patrons or Advocates; so is an inferior People free, though in League with a people superior unto them in dignity. For they may be under their protection, though not under their Jurisdiction, as *Sylla* speaks in *Appian*. An example we have in the *Diluvian*, who as *Agriginaus* tells us, were *diuinae cives*. Free to live by their own Laws, though they served the Persian in his Wars. This was the design of the Emperor *Nero*, to divide the Empire among the Sons of her Husband, that the younger Sons should be inferior to the Elders in dignity; but otherwise they should be Independent and Absolute in power. *Cicero* speaking of that Golden Age of the Roman Empire, faith, *Paromum Sociorum paras eos effe, non Imperium*, the Romans gave protection to their Friends and Allies, but claimed no dominion over them. With whom *Scipio Africannus*, The People of Rome had rather oblige their Neighbours into them by Courtesey, than by Fear; and to win foreign Nations into them by Faith and Friendship, than by Subject them to an ungrateful bondage. And what *Strabo* reports of the *Lacedemonians*, after the arrival of the Romans in Greece, saying, They enjoyed their own Freedoms, contributing nothing to the Romans, but the manual affairs of love and friendship. As private Protection takes not away personal Liberty, so neither doth publick take away Civil, which without Sovereign Power cannot confide. And therefore *Livy* wisely opposed to be under protection unto, to be under Jurisdiction. *Aegyptus Cefar* (as *Josephus relates*) threatened *Syllus* King of *Arabia*, that if he abdicated not from injuring his neighbours, he would quickly make him, of a Friend, a Subject; which was the condition of the Kings of *Armenia*, who being under the Roman Jurisdiction, retained only the Title of Kings, but not the Power: As did also the Kings of *Cyprus* and some others, though in name Kings, yet were they Subject to the Persian Monarchy, as *Diodorus* calls them. But here it may be objected what *Proculus* adds, But some who belong to our Confederates, are with us found guilty, whom being condemned we may punish. But that we may understand these words, we must know, that there are four kinds of differences that usually arise among Confederates. As in the first place, If the Subjects of the King or State under protection, are fad to have done any thing against the League: Secondly, If the King or States themselves are accused; Thirdly, If the Associates that are under the protection of the fame King, do quarrel one with another: Lastly, If Subjects complain of Injuries done them, by those under whose Jurisdiction they are.
If the Controversies be of the first kind, the King or State are obliged either to puni-
nish, or to deliver up the Offender to the person injured. And this ought to be
done, not only between unequal Confederates, but between equals, even be-
tween such as are not linked together by any League, as shall be shewed anon.
Nay farther, He is obliged to endeavour that satisfaction be made to the injured person,
which in Rome was called the Reciprocators office: For the Law (Said Elias Gallus in Fe-
fus) doth determine between King and People, Nations and Foreign Cities, how things by the
Reciprocator may be redress'd, and how they may be received, and how private mens" cases may be
prosecuted in each Nation. For one of the Confederates can have no right directly to ap-
prehend or to punish the Subjects of the other Confederacy; and therefore Decius Magnus,
a Campan., being apprehended and bound by Hannibal, and so conveyed to Cypres, and
from thence sent to Alexandria; pleased, that he was bound by Hannibal, contrary to the
Articles of the League, whereupon he was presently set at liberty. As to the second
kind of Controversies, One of the Kings or People Confederate hath power to compel
the other to keep the Articles of the League, and in case of refusal to punish him; but
neither is this peculiar to a League that is unequal, but may be done in one that is equal:
For it is enough to justify any man for seeking a revenge against him that hath wronged
him, that he is not subject unto him, as shall be proved anon; wherefore this is also in
force even among such people as are not Confederated. The third sort of Contro-
versies are amongst such as are equally Confederated, and these are usually referred to a Dyme
or Convention of the States associated, yet not therein concerned: For the Greek, the
Latins, and the Germans were wont to do, or otherwise referred to Arbiters, or even
to the Prince of the League, as to a common Arbitrator. So in an unequal League it is usu-
ally agreed, that the things in controversy shall be difficult in that Nation which is supe-
rior in the League, wherefore neither doth this argue a superiority in power; for even
Kings themselves refuse not to have their own causes sometimes tryed before such Judges,
even as themselves have constituted. But of the last kind of Controversies, Arbitrators
have no right at all to judge; and therefore when Herod did vehemently accuse his two
Sons before Augustus Caesar for conspiring against his life, they took it as a favour he
had done them: Petrus de nobis Sappicium siunere tu jure, tum qua patria, tum qua Rex:
Thou mightest have inflicted what punishment upon us thou wouldst by thine own Right, both as a
Father and as a King. And when Hannibal was accused at Rome by some Carthaginians,
for stirring up Sedition amongst the Citizens, Scipio told the Senate, That it did not be-
come them to intermeddle with that which properly belonged to the City of Carthage. And her-
in it is that Aristotle puts a difference between a Society and a City, for it concerns con-
federate Societies to take care, that no injuries be committed against them; but not that
the Citizens of any one of the Confederates do not injure one another. But here again
it may be objected, That in unequal Leagues, he that is superior in the League is some-
times fain to command, and he that is inferior to obey; but neither should this move us:
for this is when the things in controversy concern either the common good of both par-
ties confederate, or the private profit of him that is superior in that League. As to
the things of common concernment, the Assembly not sitting, He that was the Prince
of the League (though it were an equal League) did usually command his Associates, as
Agamemnon in the Trojan Expedition, did the Gracian Princes, and as afterwards the Le-
cedemonians did the Gracians, and after them the Athenians. Thucydides in that Oration
made by the Corinthians, faith, It very well becomes the Prince of the League, in private mat-
ters to deal equally; but in publick to be more than ordinarily judicious. Iperates commend-
ing that excellent conduct of the ancient Athenians, in the managing of their local
Wars, faith, That they took care for all, without interchanging upon the liberty of any. And in
another place he allows them, to Command, but not to Dominate. It is well worth our ob-
ervation, that what the Latins express by the word Imperium, to command, the Greeks
more modestly express by the word nomos, to dispose or let in order. The Athenians, to
whom the conduct of the War against the Persians was committed, say, faith Thucy-
dides, did order which City should contribute Money, and which Ships: And they that were sent
from Rome into Greece, are said to be sent to give orders for the well governing of the free Cities.
Now if he that is the principal party in an equal League do thus, it is not to be wondered
at, if he that in an unequal League is superior in honour and dignity, do the same: For the
word Imperium, that is, Empire, taken in this sense as it signifies only an Ordinance and Appointment,
equally conducing to the common good, both not at all imply the loss of the others liberty. The Rhodians,
in their Oration to the Roman Senate, thus bespeak them, The Gracians were wont to defend their Empire with their own forces: But their Empire where now it is, they wish that it may remain for ever: They are now well contented to
defend their liberties with your Arms, being no longer able to do it with their own. So Dio CURDS
tells us, that after the taking of the Caudine Fork by the Thessals, many of the Gracian
Cities met and agreed among themselves, That every City in Greece should enjoy its own freedom,
freedom, yet the conduct of the War should be given to the Athenians. And yet Dion Prusias speaking of those very Athenians, in the times of Philip of Macedon, faith, That having at that time left their command in the War, they retained only their own liberty. So those people which Cesar reckoned to be under the command of the Suevians, he by and by calls his Confederates. But in such things as appertain to his own particular profile, the request of him that is Superior in the League, are usually taken for Commands; not that they are so indeed, but that they are in respect of their usual effects, equivalent to Commands; for he needs no force, who knows himself to be feared. Armatore fortis Regnum praeceps; the Requests of Kings have the same power as Commands. And a denial how just foever, shall be by them as ill digested as an injury. It was never heard of, faith Livy, before Caius Pothhumius, that any Cesar was either chargeable or burdensome to our Associates in any thing; and therefore were our Magistrates supplied abundantly with Mules, Pavilions, and all other Infruments of War, that so they might not require from us our Associates. In the mean time, it sometimes so falls out, That if he that is superior in the League, be more potent than the rest of the Confederates, he may by degrees at length usurp the Sovereignty over them; especially if the League be perpetual, and that he hath thereby a right to place Garrisons in any of their strong Towns, as the Athenians sometimes did, when they suffered themselves to be appealed unto from their Associates, which by the Macedonians was never done: wherefore Socrates equals the Government that the Athenians exercised in those days over their Associates, with that of Kings and absolute Princes. So the Latinos in Livy complain against the Romans, that under the specious Title of being Associates in War, they were reduced into a mere Subjection; which Society in Arms, Plurarch in the Life of Aratus, calls a Gentle Slavery. So Fleming Rufius in Tacitus, concerning the Rhodians, at first they lived in great freedom, till afterwards the Romans gently urging them, they were brought by little and little into an habit of Subjection. So the Aebrians likewise complained, That they had nothing left them but the bare shadow and empty name of Liberty. So likewise afterwards the Aebrians complain, That they had indeed a League in appearance, but were at length brought into a Precarious Servitude. The like complaint Civlis Basarum in Tacitus, makes against the same Romans, That they used them not as formerly, like Companions, but usurped and insulted over them as mere Slaves. And in another place, they falsely called that peace, which was indeed but a miserable Slavery. Thus Emmeno also in Livy, concerning the Confederates of the Rhodians, that they were their Associates in Name, but their Vassals indeed. Thus also Magnes in Polybius faith, That Demetrius was in them free, but in effect all things were done there at the will of the Romans. The Thessalians likewise were in appearance free, but indeed under the dominion of the Macedonians, as the same Polybius testifies. Now when these things are done, and so done as by patient endurance they may by mistake be said to be rightly done, (whereof we shall elsewhere discourse more fully;) then either of Companions they are made Subjects, or certainly there must be a partition of the Supremacy, which (as I have said before) may sometimes happen. They that pay any thing either in satisfaction of wrongs past, or to be protect-ed against injuries to come, are by Thucydides called tribunal Associates, such were the Kings of the Hebrews, and of their Neighbor Nations after the time of M. Anthony, free; though under a certain tribute: Nor do I see any cause to doubt but that they that Reigned so, had Supreme Power within their respective Dominions, and had a full right to punish delinquents, according to their own Laws. Thus M. Anthony defends King Herod, being accused for murdering Aristobulus, That it was neither just nor right to call King to an account for what he did as a King; for if so, he could not be a King. For common equity requires that they that gave him that honour, should protect him the free use of that Sovereign Power, which was appertained unto it. So Chrysolto, When the Empire of the Jews began to decline, and they made Tributaries to the Romans; They neither enjoyed that full liberty which they did formerly, nor were they in that pure Subjection as now they are: But were indeed honoured with the Title of Associates, yet they paid Tribute to their Kings, and received Governors from them. Moreover, they had the free use of their own Laws, so that if any of their Countrymen offended, they themselves punished them by their own Laws. And yet I deny not but even this very acknowledgment of their own weaknesses and insufficiency, doth somewhat abate and detract from the Majesty of their Empire. But that which seems to come to be more difficulty to be answered, is, when one Prince holds his Dominion from another, as being Lord of the Fief; which yet may be sufficiently answered by what hath been said before. For in this Contract (which is peculiar to the German Nation, and no where found but where they have planted themselves) two things are especially to be observed. 1. The personal Ob-
... ligation. 2. The Right in the Thing so held. The Personal Obligation is the same, whether a man possession the very Right of Sovereignty, or any thing else though lying elsewhere, by virtue of the Fief; but such an Obligation as it takes not from a private man the right of Personal Liberty; so neither doth it diminish any thing in a King or State of the Sovereignty, which is Civil Liberty; which is easily to be understood by those Lands which are called Free-holds, which consist in Personal Obligations only, but gives no right in the thing so held: for there are no other than a species of that unequal League whereof we have discoursed before, wherein the one promiseth Fealty, and the other safeguard or protection. But admit they do swear Faith and Allegiance against all men, yet would this detract nothing from the Right of Sovereignty over their own Subjects. Not at all in this place to mention, that there are ever referred in these Oaths, a tacit Condition that the War be just, whereof we shall treat elsewhere. But as to the Right in the thing so held, it may be such, that the very Right of Governing, if held in the right of the Fief or Fee, may be lost, and so return unto him that gave it; as well in case the Family be extinct, as also for some notorious crimes; and yet notwithstanding in the mean time, it ceaseth not to be the Supreme Power: For as I said before the thing itself is one thing, and the manner of holding it is another. And by this Right I find many Kings constituted by the Romans, so that the Royal Family failing, the Empire did escheat unto themselves, as Strabo observes of Papplonias and some others.

Lastly, We must also distinguish as in Private Dominion, so in Empire, between the Right itself, and the exercise of that Right; or between the first act and the second. For as a King (though an Infant) hath a Right to govern, but is not permitted to exercise that Right; so he that is mad, or a Prisoner, or that so lives in a Foreign Country, that he is not permitted freely to act in such matters, as concern the good of that Empire that is remote from him: For in all such cases, they have their Lieutenants or Viceroy's to act for them, wherefore Demetrius living under restraint with Seleucus, did forbid any credit to be given to his Letters or unto his Seal; but commanded that all things should be so governed as if he were dead.
CHAP. IV.

War by Inferiors against their Superiors unlawful.

Of a War made by Subjects against their Superiors.

1. The Question stated.
2. War against Superiors, as such, ordinarily unlawful: This proved by the Law of Nature.
3. By the Hebrew Law.
4. By the Gospel Law; proved by Scriptures.
5. Of the Practice of the Primitive Christians.
6. For, Inferior Magistrates to make War against the Supreme, unlawful: Proved by Reasons and Scriptures.
7. What is to be done in a case of extreme and inevitable Necessity.
8. That a free People may make War against their Prince; if he be accountable unto them.
9. And against a King who hath renounced his Kingdom.
10. Who is about to alienate it; as to the delivery of it, only.
11. Or if a King do manifestly carry himself as a perfecuted enemy against the whole body of his people.
12. Or shall forfeit his Kingdom by a wilful breach of that condition upon which he was admitted unto the Empire.
13. Or, if having but one part of the Supreme Power, he shall invade the other.
14. Or if any such liberty of resistance be, in such a case, reserved unto the people as his admission.
15. How far forth Obedience is due to him that usurps another man's dominions.
16. An Usurper may be killed, the War continuing; If no Faith nor Agreement be given or made to the contrary.
17. Or if Licence be given by an Antecedent Law.
18. Or by warrant from him, who hath Right to the Empire.
19. Why an Usurper is not to be killed, but in these cases.
20. In a converted Right, Private men are not to be Judges.

Private Men may without doubt make war against private men, as the Traveller against the Thief or Robber; so may Sovereign Princes and States against Sovereign Princes, as David against the King of the Ammonites: Private men may make war against Princes, if not their own, as Abraham against the King of Babylon and his Neighbours; so may Sovereign Princes against Private Men, whether they be their own Subjects, as David against Ishbosheth and his party; or Strangers, as the Romans against Pyrates. The only doubt is, whether any person or persons, publick or private, can make a lawful war against those that are set over them, whether as supreme or as subordinate unto them. And in the first place, it is on all hands granted, that they that are commissioned by the highest powers, may make war against their Inferiors; as Nebuchad did against Tobia and Sanballat, by the Authority of Artaxerxes. But whether it be lawful for Subjects to make war against those who have the Supreme Power over them, or against such as act by and according to their Authority, is the thing in question. It is also by all good men acknowledged, That if the Commands of a Prince shall manifestly contradict either the Law of Nature, or the Divine Precepts, they are not to be obeyed; for the Apoftles when they urged that Maxim, Deo magis quam dominibus obediemus, That God is rather to be obeyed than men; unto such as forbid them to Preach in the name of Jesus, did but appeal to a Principle of right reason, which Nature had inculpt in every mans breast, and which Plato expresseth in almost the very same words. But yet if either for this, or for any other cause, any injury be offered unto us, because it so please him that hath the Sovereign Power, it ought rather to be patiently tolerated, than by force refisted: For although we do owe an absolute obedience to such Commands of Princes, yet we do owe a passive: though we ought not to violate the Laws of God or of Nature, to fulfil the will of the greatest Monarch; yet ought we rather patiently to submit to whatsoever he shall inflict upon us for not obeying, than by resistance to violate our Country peace: The best and safest course we can steer in such a case, is either by Flight to preserve our selves, or resolvedly to undergo whatsoever shall be imposed on us.

And naturally all men have a right to repel Injuries from themselves by refisting them, (as we have already said.) But Civil Societies being once constituted for the preservation of Peace, there presently succeeded unto that Common-wealth a certain right over us and ours, so far forth as was necessary for that end. And therefore that promiscuous Right that Nature gave us to refist, the Common-wealth, for the maintaining of good order and the publick peace hath a right to prohibit, which without all doubt it doth, seeing that otherwise it cannot obtain the end it proposeth to it self. For in case that promiscuous
promiscuous Right of forcible resistance should be tolerated, it would be no longer a Common-wealth, that is, a Sanctuary against Oppression, but a confufed Rabble, such as that of the Cyclops, wherein the Poet thus:

——Where every Ass
May on his Wife and Children Judgment pass.

A Dissolute Company where all are speakers and no hearers: Like unto that which Valerius records of the Brisci

——Who all Leagues and Laws disdain,
And Justice, which men minds in peace retain.

Salut makes mention of a wild and savage people, living like Beasts in Woods and Mountains without Laws and without Government, whom he calls Aborigines: And in another place of the Getuli, who had neither Laws, good Customs, nor any Princes to govern them. But Cities cannot subsist without the Law, Generalis patrum est societas humana regibus obedient.; All humane Societies, faith St. Augultine, unanimously agree in this, to obey Kings: So Aischylus,

Kings live by their own Laws, subject to none.

And Sophocles,

They Princes are, obey we must, what not?

To the same Tune sings Euripides,

Folly in Kings must be with patience born.

Whereunto agrees that of Tacitus, Principi summum rerum arbitrarium Dii dedere, &c. Subditis olefemni gloria velicet est: God hath invested a Prince with Sovereign Power, leaving nothing to Subjects but the glory of Obedience. And here also,

Things base seem Noble, when by Princes done;

What they Impose, hear thou, be't right or wrong.

An Officer striking must not be struck again.

III.
The unlawfulness of making war against our Superiors professed by the Jewish Law.

But right differing from Just.
War of Subjects against their Superiors unlawful.

of being refisted. And therefore it is added in that place of Samuel before cited, That when the people should at any time be thus oppressed by their Kings, as if there were no remedy to be expected from men, they should invoke his help who is the Supreme Judge of the whole Earth. So that whatsoever a King doth, though the same done by an inferior person would be an injury, yet being done by him is Right. As a Judge is said justus redrectu, to do right, though the sentence he gives be unrighteous.

When Christ in the New Testament commanded, to give Cæsar his due, doubtless he intended, that his Discpiles should yield as great, if not a greater obedience, as well active as passive, unto the higher Power, than what was due from the Jews to their Kings: which (St. Paul, who was best able to interpret his Masters words) expounding Rom. 13. doth at large describe the duty of Subjects; charging those that repute the power of Kings, with no less Crime than Rebellion against Gods Ordinance; and with a Judgement as great as their sin. For faith, They that do so resist, shall receive unto themselves damnation. And a little after, he urgeth the necessity of our subjection, Not altogether for fear, but for Conscience, as knowing, that He is the Minister of God for our good. Now if there be a necessity of our subjection, then there is the same necessity for our not resisting; because, he that resists is not subject. Neither did the Apostle mean such a necessity of subjection as ariseth from an apprehension of some worke inconvenience that might follow upon our resistance: But such as proceeds from the fenfe of some benefit that we receive by it, whereby we stand obliged in duty, not unto man only, but unto God; (So that he that resists the power of the Supreme Magistrate, incurs a double punishment, faith Plato, First, From Gods, for breaking that good order which he hath constituted amongst men: and Secondly, From the Common-wealth, whose righteous Laws, made for the preservation of the publick peace, are by resistance weaged, and the Common-wealth thereby endangered. For confc upon believes, faith Plato, that any City or Kingdom can long stand, and when the publick Decrees of the Senate shall be wilfully broken, and trampled upon by the over-swelling power of some private men, who in stuggling against the execution of the Laws, do as much as in them selves, disfigure the Common-wealth, and consequently bring all into confusion. The Apostle therefore fortifies this necessity of publick subjection to Princes with two main Reasons: First, Because God had constituted and approved of this Order of Commanding and Obeying; and that not only under the Jewish, but under the Christian Law: wherefore the Powers that are set over us are to be observed (not servilely, superfiicionally or out of fear, but with free, rational and generous Spirits) tamquam a Deo ordinate, as being given by the Gods, faith Plato; or as St. Paul) tamquam a Deo ordinata, as if ordained by God himself. Which order, as it is originally Gods, so by giving it a Civil Sanction, it becomes ours also; for thereby we add as much authority unto it as we can give. The other reason is drawn from profit: Because this order is constituted for our good, and therefore in Conscience to be obeyed and not resisted. But here some men may say, That to bear Injuries, is not at all profitable unto us, whereby unto some men (happily more truly, than affectionately, to the meaning of the Apostle) give this answer, That patiently to bear injuries, conducteth much to our benefit; because it entitlcss us to a reward far transcending our sufferings, as St. Paul refstifies. But though this also be true, yet is it not (as I conceive) the proper and genuine fenfe of the Apolites words, which doubtless have respect to that universal Good, whereunto this order was at first instituted, as to its proper end, which was the publick Peace, wherein every particular man, is as much concerned, if not much more than in his private. (For what protection can good Laws give, if Subjects may refuse to yield their obedience to them; whereas by the constant observance of good Laws, all estates, both publick and private do grow up and flourish together.) And certainly these are the good Fruits that we receive from the Supreme Powers, for which in Conscience we owe them obedience. For no man did ever yet with ill to himself. (But he that resists the power of the Magistrate, and wilfully violates the Laws established, doth in effect (as far as in him is) dissolve his Countries peace, and will in the end bury himself also in the ruins of it.) Belides, the Glory of Kings consis in the prosperity of their Subjects. When Sylia had by his Cruelty, almost depopulated, not Rome only, but all Italy, one folemnly a monition him, Sineudos efe aliquis vivere, ut essent, quibus imperet; That some should be permitted to live, over whom he might rule as a King. It was a common Proverb among the Hebrews, Nii potellatis publica elicer, after alterum vivum delectare; Were it not for the Sovereign Powers, every Kingdom would be like a great Pondo wherein the greater Fish would always devour the lesser. Agreeable whereunto is that of Chryfoften, Unless there were a power over us to restrain our Inordinate Lusts, men would be more fierce and cruel than Lyons and Tigers, not only being, but eating and devouring one another. Take away Tribunals of Justice, and you take away all Rights; Property and Dominion: No man can cry, this is mine House; this is my Land, these my Goods, or my Servants: but chry. de fze. Omnia crucre fortiorum, the longest Sword would take all. The mighty man could be no taws. As Eph. 5:11, the stronger a fruit of his Estate, than until a mightier than he came to dispossef them; the
weaker must always give place to the stronger; and where the strength was equal, the law was to be too. And this would at length introduce a general Anarchy, which would be far more perilous than a perfect Slavery. Wherefore seeing that God hath established, and humane reason upon tryal, approved of Sovereign Empire, as the best preservative of humane Societies, that every man should yield obedience thereunto, is most rational. For without Subjection, there can be no Protection. But here it will be objected, That the Commandts of Princes do not always tend to the publick good, and therefore when they decline from that end for which they were ordained, they ought not to be obeyed. To which I answer, That though the Supreme Magistrate doth sometimes, either through Fear, Anger, Lust, Covetounfe, or such like inordinate passions, baulk the ordinary path of Justice and Equity; yet are these, happening but seldom, to be pulled over as personal blemishes, which (as Tacitus rightly observes) are abundantly recompens’d by the more frequent example of better Princes. (Besides, the Lives of Princes are to be considered with some grains of allowance, in respect of those many provocations and opportunities they have to offend, which private men have not: All men have their Failings, we our selves have ours; and in cafe we will admit of none in Kings, we must not rank them amongst men, but Gods. The Moon hath her spots, Venus her Moles; and if we can find nothing under the Sun without blemish, Why should we expect perfection in Kings? He is very uncharitable, that judges of Rulers by some few of their Evil deeds, palling over many of their Good ones. Seeing therefore, that there is in all mens lives, as in our bottom Coin, an Intermixture of Good and Evil, it is sufficient to denominate a Prince Good, if his Virtues excel his Errors. Besides, to charge the Vices of Princes upon the Government, as they usually do who affect Innovation, is but a cheat: For what is this, but to condemn the Law for the Corruption of some Lawyers: Or Agriculture, because some Husbandmen do curse God for a Storm? Si ment tur, ego mentur, non negatur; If I do lyse, (Stith the Merchant in St. Anguifine) it is I am that am to be blamed, not my Calling. And if some Princes do prevaricate in some things, they and not their Function are to be blamed.) But as to Laws, though they cannot be so made, as to fit every mans Cafe, yet it sufficeth to denominate them good, if they obviate such disorders as are frequently practifed, and go do good to the generality of the people. But as to such cafes, which, because they rarely happen, cannot so easily be provided against by particular Laws, even these also are underftood to be restrained by general Rules. For, though the reafon of the Law being generally applied to that special Cafe, hold not; yet in the general, under which special cafes may lawfully be comprehended, it may. And much better is it so to do, than to live without Law, or to permit every man to be a Law to himself. Very apposite to this purpose, is that of Seneca, Better it is not to adorn of some excuss, though juff, from a Few, than that All should be permitted to make whatsoever they please. Memorable is that of Pericles in Thucydides, Better it is for Private men, that the Common-wealth flourish, though they thrive not in it, than that they should abound and grow rich in their own private estates, and the Common-wealth pine and wither. For if the whole be ruined, every private mans Fortunes must needs be ruined with it: But if the Common-wealth flourish, every private mans estate, though in it self weak, may intime be repaired. Wherefore, since the State, if well ordered, can easily support any private mans fortunes; but a private mans estate, though never so well ordered, cannot repair the loss of the Publick State: Why do ye not rather contribute your utmost care to advance the Publick, than (as ye now do) seek to build your own private Fortunes upon the publick Ruines? Wherewith agrees that of Aemuloe, Eadem eft lugularum utilitas, qua univerorum; The Profit which the Common-wealth receives, redounds to every private man. And that also in the Law, Semper non quod privatum inter alios existat, sed quod communis societatis expedit, servari debet; Eternom, not that which particularly advantaeth any one party, but that which conduceth to the benefit of the Common Society is to be observed. (When the common people in Rome began to mutiny on reason of some Taxes extraordinarily imposed on them, Levatio the Conful exhorted the Senate, to encourage the people by their own example; And to that very end advized every Senator to bring into the Senate-house all the Gold, Silver and Bras’s money he had, that it might be delivered to the Trivomviri for the publick service: adding this Reason, If our City overcome, no man needs to fear his own estate; but if it fall, let no man think to preserve his own.) For as Plate rightly observes, What is common strengthens a City; but what envicheth Private Families only, weakens and disjoins. And therefore it concerns both Princes and Subjects, to prefer the affairs of the Common-wealth, before their own private, (either pleafure or profit.) It is a very true Observation of Xenophon’s, He that in an Army behaveth himself sedulously against his General, sins against his own life. And no lef true is that of Sambucius, No man should think himself a Lifer by what the Common wealth gains; for every private mans loss is sufficiently recompens’d in the Publick Profit. For as in the Natural body, so doubts in the Civis, in toctius Salute, Salus eft partium; The well being of every part confifts in the safety of the whole. But without doubt, among those things that are...
Chap. IV. The War of Subjects against their Superiors, unlawful.

are publick, the chief and principal is that asfoend Order of well Commanding and well Obeying; which cannot conftit where private Subjects allfine that Licentce of re-
fiing the publick Magiftrates: which is excellently defcribed by Dion Caflius, whose
words found much to this fene, I cannot conceive it fomly for a Prince to feafue to his Su-
piets; for there can be no Seferty, where the Prefs are advanced above the Head, or where
they undertake to govern whose duty it is to be governed. When a defigna conftiffion would it interure
in a Family, if Children should be permitted to defile their Parents, or Servants to difpute the
commands of their Maffers? In what a defperate condition is that patient, that will not be ruled
in all things by his Physicians? And what hopes can there be of that Ship, where the Mariners re-
ufe to obey their Pilot? Surely God hath ordained, and humane reafon upon tryal hath found it
neceffary, that for the prefervation of humane Society fame should Command, and fame Obey.
To
the Teltimony of St. Paul, we fhall add that of St. Peter, whose words are thefe, Honor
the King. Servants be ye subjeft to your Maffers with all Fear, and not only to the good and
gentle, but also to the fhroward: For this is Thank-worthy if a man for Confeffion towards God
endure grief, fuffering ungrifly. For what glory is it, if when ye be buffetted for your fakes ye
take it patiently? But if when ye do well, and fuffer for it, ye take it patiently, this is acceptable
with God. And this he bey and by confirms by Christ's own example. Which Clemens alfo
in his Conftitutionis thus expreffeth, The fervants that feareth God, faith he, will serve his
Maffer also with all faithfulness, yet, though he be impious and unjust. Whence we may obferve two things: First, That under the fubjeftion that fervants are in, even to hard Maffers, is alfo couched that of Subjefts unto Kings, though Tyranical. And then,
as a little before, he commanded fubjeftion to every humane ordinance; that is,
to the Laws and Conftitutions of Princes without diftiffion, (for when that Epiftle was written, there were very few Princes that were not Idolaters,) yet submit we muft, faith St. Peter, for all that, and that Proper Dominum, For the Lords fake. So what fol-
lows in the fame Chapter being built upon the fame Foundation, respects the duty as
well of Subjects as of Servants. And fo requires the fame Obedience, as well Paffive as Active; Such as we unifally pay to our Parents, according to that of the Poet,

Thy Parents Love if Good: If Bad, yet bear.]

And that alfo of Terence,

To bear with Parents, Piety commands.

And that likewise of Cicero, in his Oration for Cluentius, Men ought not only to cancel the
Injuries done unto them by their Parents, but to bear them with patience. A young man of
Etruria, that had been long educated under Zeno, being demanded, What he had learned? Anwered, Meekly to bear his Fathers wrath. So Juffin relates of Lyfianus,
That he endured the reproaches of the King with the fame calmnes of Spirit, as if he had been his
Father. Ferenda funt Renum Ingenia, The honours of Kings must be endured, faith Ta-
cius: And in another place he tells us, That good Emperours are to be fupportfited for, but what-
soever they are, they muft be obeyed. So alfo Livy, As the rage of our Parents, fo the cruelty of
our Country are no ways to be bernounced, but by patience and fufferance: For which Clau-
dian highly extolls the Perfians, who obeyed all their Kings equally, though never to
cruel.

Neither did the Practice of the Primitive Chriftians ferve from this Law of God,
which is an undeniable argument that they fo ununderftood it. For though the Roman
Emperours were fometimes the very worst of men, and deadly enemies to the Chriftian
Faith; ye, though there wanted not fuch under their Government, who under the fpeci-
cious pretence of freeing the Common-weath from Tyranzy and Oppreffion, took
Arms against them, yet could they never perfwade the Chriftians to payn with them.
In the Conftitutions of Clemens we read, Regia posuitis, res ubi nefit; To refift the power of
a King is Impeccious. Tertullian in his Apology writes thus, What was that Caflius that con-
fiited againft the life of Julius Cæsar? What was that Poefannius Niger that in love to his own
Contry, took Arms in Syria, as Clodius Albinus did in France and Britain, againft that
bloody Emperor Septimius Severus? Or what was that Plautians, who for the Common wealth
free from Tyranzy attempted the life of the fame Emperor in his own Pallace? What was that
Aelius Letus, who burning firi poifonad that Infamous Emperor Commodus, fearing it should
not take that effe(f which he defired, did afterwards hire Narcillus, a strong Welfter, to strangle
him? Or what was that Parthenius (whofe fake Tertullian doth fo much defire,) who being
Chranbeian to that execrable Tyrant Domitian, yet killed him in his own Chamber? What
(Sake Tertullian) were all thefe? Surely not Chriftians, but Romans: Nay fo abominatad they
were by Chriftians, that Tertullian feems to glory in this, That though Chriftians were every
where reproached as Enemies, many Traitors to the Imperial Crown, yet could they never find
any of them either joined with that crime, or fo much as fowing those Trefonable practices of
either
either Callius, Niger, or Albinus. When St. Ambrose was commanded by the Emperor Valentinian to give up his Church to be Garrison'd by Souldiers, though he thought it to be an Injury done, not only to himself, and to his Congregation, but even unto Christ himself; yet he would not take any advantage of the commotions that it made among the people, to make reftance. If the Emperor, faith he, had commanded what was in my power to give, were it, even Hate, Land, Goods, or Silver, how readily would I obey; whenever is mine I would willingly offer: But the Temple of God I cannot give away, nor can I yield it up to any men: Can ad adscendendum non ad tradendum illud accipere, Since it was committed unto me to defend, and to keep, but not to betray. And whereas the people being enraged thereby, did offer their affiance to repel the Souldiers, he refufed it, laying, Caedus separare non vult; Though provoked and compelled the contrary, yet whenfand or refuf I cannot: Graces, and weep, and mourn I can: Against Arms, Souldiers, and Gods. I have no other Weapons but Tears: For there are the only Forts and Monuments of a Priest: Alter ane debeo nec pallium refilire, otherwise I neither ought, nor can refuf. And pre- fently, after being commanded to appeale the Tumult, he replied, That not to excite them was in his power, but being exasperated and enraged, to appeafe them was in the sole power of him, who when he pleased, could fill the ragings of the Sea, and the madness of the people. And in another place he writes thus, Will ye none to preflon, or call me into chains, I am willing to fuffer, neither shall I guard my self with multitude of people who offer themselves to defatne me. Nor would he be made use of the Forces of Maxiumus when offered against the Emperor, though an Arion, and a grievous percursor of the Church. In imitation of whom Gregory the Great in one of his Epiftles confefths, That if he would have engaged himself in the death of the Lumbards, that Nation bad at that day had neither Kings, Dukes nor Earls, but had been reduced into extreme confufion. Nazianzen informs us, That Julian the Apostate was diverted from some bloody designs he intended against the Church, by the tears of Christians: Adding withal, That these are our oll perfonations against Perfonations. And became a great part of his Army were Christians, therefore his cruelty towards them would have been not injurious to the Church of Christ only, but would at that time have much endangered the Commonwealth: Unto all which we may also add that of St. Augustine, where expounding those places of St. Paul, he faith, Even for the prefervation of our own lives, we ought to submit to the Supreme power, and not to reft them, in whatsoever they fhall take away from us.

So there are very few men there are even in this age, who accomodating themselves too fervility to the times and places wherein they live, do pervert themselves first, and then others. That though this Licence of refilling the Supreme Power be inconfituent with the condition of private men, yet it may agree with the Rights of Inferior Magiftrates; much farther, that they fin in cafe they do not: which opinion is to be exploded, as Scifitions. For as in Logick there is a Genus which is called Subalterne, which though it be compofitive of all that is under it, as a living creature compofes both man and bat; yet hath it a Genus above it, in refpect whereof it is but a Species: As a living creature is a body, which compofes both forts of bodies, both animate, and inanimate. The like we may lay of Magiftrates, some are Supreme, who rule all and are ruled by none; others are fubordinate, who in refpect of private men are publick perfonps, governing like Princes: But in refpect of the Supreme Magiftrate are but private men, and are commanded as Subjefts. For the power or fucceffory of Governing as it is derived from the supreme power, fo it is fubjeft unto it, and whatsoever is done, by the Inferior Magiftrate, contrary to the will of the Supreme is null, and reputed but as a private act, for want of the fum of publick Authority. All order (fay Philofo- phers) doth necessarily relate to fomewhat, that is fift and highest, (from whence it takes its rise, or beginning. Now they that are of this opinion, that Inferior Magiftrates may refil the Supreme, feem to introduce fuch a ftrange thing, as the Poets fanned to have been in Heaven before Majeftry was thought on, when the Marfhal Gods denyed the Prerogative of Jupiter. But this order or fubordination of one to another is not only approved by of common experience, as in every Family the Father is the head, next unto him the Mother, then the Children, and after them the Servants, and fuch as are under them: So in every Kingdom, Each power under higher powers are ____. And, All Governors are under Government — To which purefe is that notable saying of St. Augustine, Obferve, faith he, the degrees of all humane things: if thoy Tuar enjoy them anything, then myfelf do it; yet not, in cafe the Pronounf command the contrary: Neither muff they obey the Confuf, if thy Prince command {videlicet} others, if not at least he be faid to contain Authority, but the felf fubjef{sic] to obey that which is fubjef{sic} to the Prince. Neither ought the felf powers to be offended that the greater is preferved before them. (For God is the God of order.) And that also of the fame Father concerning Pilot, Bacuf, faith he, God had impreft him with fuch a power as was is felf {uidicit} of authority to that of Cesar's. But it is also approved of by Divine Authority: For St. Peter enjoyus us to be fubjef{sic} unto Kings otherwise, than unto Ma-
giftrates: To Kings as Suprime, that is, absolutely, without exceptions to any other com-

1 Ep. 2.1

Ad John.
commands than those directly from God; who is so far from justifying our resistance, that he commands our passive obedience: But unto Magistrates, as they are deputed by Kings, and as they derive their Authority from them. And when St. Paul subjects every soul to the higher Powers, doth not he exempt from Inferior Magistrates? Neither do we find amongst the Hebrews (where there were so many Kings utterly regardless of the Laws both of God and Man) any Inferior Magistrates, among whom some without all question there were but Pious and Valiant, that ever arrogated unto themselves this Right of resisting by force the Power of their Kings, without an express command from God, who alone hath an unlimited power and jurisdiction over them. But on the contrary, what duties Inferior Magistrates owe unto their Kings though wicked, Samuel will instruct us by his own example, who though he knew that Saul had corrupted himself, and that God also had rejected him from being King, yet before the people, and before the Elders of Israel, he gives him that reverence and respect that was due unto him. And so likewise the State of Religion publicly profest, did never depend upon any other humane Authority, but on that of the King and Sanctuary. For in that after the King, the Magistrates with the people, engaged themselves to the true worship and service of God, it ought to be understood, so far forth as it should be in the power of every one of them. Nay, the very images of their False Gods which were publicly erected, (and therefore could not but be scandalous to such as were truly Religious) yet were they never demolished, so far as we can read of, but at the special command either of the people, when the Government was Popular, or of Kings, when the Government was Kingly. And if the Scriptures do make mention of any violence sometimes offered unto Kings, it is not to justify the fact, but to shew the equity of the Divine Providence in permitting it, and whereas they of the contrary persuasion do frequently urge that ancient saying of Trajan the Emperor, who delivering a Sword to a Captain of the Praetorian Band, said, Hoc pro me mereare, fortel imperio; femide contra me: Ut his Sword for me, if I govern well; but if otherwise, against me. We must know, That Trajan (as appears by Pliny's Panegyric) was not willing to assume unto himself Regal power, but rather to behave himself as a good Prince, who was willing to submit to the Judgement of the Senate and people; whole decrees he would have that Captain to execute, though it were against himself. Whole example both Pertinax and Macrinus did afterwards follow, whole excellent Speeches to this purpose are recorded by Herodotus. The like we read of M. Anthony, who refused to touch the publick Treasure, without the consent of the Roman Senate.

But the Case will yet be more difficult, whether this law of not resisting do oblige us when the dangers that threaten us be extreme, and otherwise inevitable. For some of the Laws of God himself, though they found absolutely, yet seem to admit of some tacit exceptions in cases of extreme necessity: For so it was, by the wisest of the Jewish Doctors, expressly determined concerning the Law of their Sabbath, in the times of the Hasmonaens: Whence arose that famous saying among them, Periculum animarum attistat Sabbathum, The danger of a man's life drives away the Sabbath. When the Jews in Synaia, was afflicted for the breach of the Sabbath, he excused himself by another Law, and that more forcible, saying, We were in manifest jeopardy of our lives. When Bichides had brought the Army of the Jews into a great strait on their Sabbath day, placing his Army before them and behind them, the River Jordan being on both sides; Jonathan thus bespake his Soldiers, Let us go up now and fight for our lives, for it standeth not with us to dye, as in times past: Which case of necessity is approved of even by Christ himself, as well in this Law of the Sabbath, as in that of not eating the Shew bread. And the Hebrew Doctors preted the authority of an Ancient Tradition, do rightly interpret their Laws made against the eating of meats forbidden, with this tacit exception; Not that it was not just with God to have5enited us even unto death, but that some Laws of his are more convenient about such matters as cannot easily be observed, that they were intended to have been professed with so much Rigour as to reduce us to such an extremity, as to dye rather than to disobey them, which in humane Laws doth yet further proceed. I deny not but that sometimes the virtue are so strictly enjoined, that if we perform them not, we may justly be put to death: As for a Sentinel to forsake his station. But neither is this to be rashly understood, to be the Will of the Law-giver. Nor do men allwise so much Right over either themselves or others, unless it be, and so far forth, as extreme necessity requires it. For all humane Laws are so constituted, or so to be understood as that there should be some allowance for humane frailty. The right understanding of this Law, of resisting or not resisting the highest Powers in cases of inevitable necessity, seems much to depend upon the Intention of those who first entered into Civil Society, from whom the right of Government is devolved upon the persons Governing: Who had they been demanded, Whether they would have imposed such a yoke upon all Mankind as death it fell, rather than in any case by force to repel the Influencies of their Superiors; I much question, whether they would have granted it, unless it had been in such a case, where such resistance could not be made without
great commotions in the Common-wealth, or the certain destruction of many innocents; for what Charity commends in such a case as to be done, may, I doubt not, pass for an humane Law. But some may say, that this rigid old gation to dye, rather than at any time to resign injuries done by our Superiors, is not imposed on us by any humane, but by the Divine Law. But we must observe, That men did not at first unite themselves in Civil Society, by any special Command from God, but voluntarily out of a fence they had of their own impotency, to repel force and violence whilst they lived solitarily, and in families apart; whence the Civil Power takes its rise: For which cause it is, that St. Peter calls it an humane ordinance, although it be elsewhere called a Divine Ordinance, because this wholefofe constitution of men was approved of by God himself. But God in approving an humane Law, may be thought to approve of it as an humane Law, and after an humane manner. Birkley (who was the foremost Champion in defending Kingly Power) doth notwithstanding thus far allow, That the People or the nobler part of them, have a right to defend themselves against cruel Tyranny, and yet he confesseth that the whole body of the people is subject unto the King. Now this I shall easily admit. That the more we define to secure any thing by Law, the more express and peremptory should that Law be, and the fewer exceptions there should be from it; (for they that have a mind to violate that Law, will presently seek shelter, and think themselves privileged by those exceptions, though their cases be different;) Yet dare I not condemn indifferently either every private man, or every, though lefser, part of the people, who as their last refuge, in cases of extreme necessity, have anciently made use of their Arms to defend themselves, yet with respect had to the common good. For David, who (having in some particular Facts) was so celebrated for his integrity, did yet entertain half four hundred, and afterwards more armed men; to what end, unless for the safeguard of his own person, against any violence that should be offered him? But this all we must note, That David did not this until he had been afflicted, both by Jonathan, and by many other infaftible Arguments, that Saul sought his life; and that even then, he neither invaded any City, nor made an Offensive War against any, but looked only for his own security, sometimes in Mountains, sometimes in Caves, and such like devious places, and sometimes in Foreign Nations, with this resolution, to decline all occasions of annoying his own Countrymen. A Fact parallel to this of David, we may read of in the Maccabees: For whereas some seek to defend the Wars of the Maccabees upon this ground, That Antiochus was not a King, but an Ulterper; this I account but frivolous: For in the whole Story of the Maccabees, we shall never find Antiochus mentioned by any of his own party, by any other Title than by that of King; and deferredly: For the Hebrews had long before submitted to the Macedonian Empire, in whose Right Antiochus succeeded. And whereas the Hebrew Laws forbid a Stranger to be set over them, this was to be understood by a voluntary Election, and not by an involuntary Compulsion, through the necessity of the times. And whereas others say, That the Maccabees did act by the peoples right, to whom belonged the Right of Governing themselves by their own Laws, neither is this probable: For the Jews first girt conquered by Nebuchadnesser, were by the right of War subject unto him, and afterwards became by the same Law, subject to the Medes and Persians as Successors to the Chaldeans, whose whole Empire did at length devolve upon the Macedonians. And hence it is, that the Jews, in Tacitus, are termed The most servile of all the Eastern Nations; neither did they require any Covenants or Conditions from Alexander or his Successors, but yielded themselves freely, without any limitations or exceptions, as before they had done unto David. And though they were permitted sometimes to lake their own rites, and publicly to exercise their own Laws, yet was not this due unto them by any Law that was added unto the Empire, but only by a precarious Right, that was indulged unto them by the favour of their Kings. There was nothing then that could justify the Maccabees in their taking of Arms, but that ineffable Law of extreme necessity, which might do it so long as they contained themselves within the bounds of self-preservation, and in imitation of David, betook themselves to fierer places, in order to their own security; never offering to make use of their Arms unless violently assailed. In the mean time, Great care is to be taken, that even when we are thus enforced to defend our selves in cases of certain and extreme danger, we spare the Person of the King; for they that conceive the carriage of David towards Saul, to proceed not so much from the necessity of duty, as out of some deeper consideration, are mistaken. For David himself declares, that no man can be innocent that firsteth forth his hand against the Lords anointed; Because he very well knew that it was written in the Law, Thus shalt not revile the Gods, that is, the Supreme Judges: Thou shalt not curse the Rulers of thy people. In which Law, special mention being made of the Supreme Power, it eftensively flows that some special duty towards them is required of us: Wherefore Optatus Alexander speaking of this fact of David, faith, That Gods special command coming fresh into his memory, did so restrain him, that he could not hurt Saul, though his mortal
enemy. Wherefore he brings in David thus reasoning with himself, if Valabim infect visceris, fed prius eft divina praepotita obseruare; Willingly would overcome mine enemy, but I dare not transgress the Commands of God. And Josephus speaking of David, after he had cut off Saul's Garment, faith, That his heart sore him; So that he confessed, injungit sancfius Jan Ragem sum occidere, It was a wicked all to kill his Sovereign. And positively, after Herod's Roman Ragem quamui malum occidere, Panm eximium faciunt immolare conflar, ab eo qui Ragen ut re. It is an horrid all to kill a King, though wicked, for certainly he, by whose Presence all Kings reign, will pursue the Regicide with vengeance incalculable. To reproach any private mad em is forbidden by the Law, but of a King, we must not speak evil though he deserv, because he that wrote the Problems (fathered upon Aristotle) faith, He that speak ev ill of the Governor, shall die the whole City. So Jost concludes concerning Sannus, as Josephus testifies, Shall then not dye, who pretend to come him whom God hath placed in the Throne of the Kingdom? The Laws (faith Julian) are very severe on the behalf of Princes, for he that is injured unto them, doth trittfully trample upon the Laws themselves. Now if we must not speak evil of Kings, much less must we do evil against them. David repented but for offering violence to Saul's Garments, Jo great was the Reverence that he bute to his Person, and deliveredly, for since their Sovereign Power cannot but expel them to the general hatred, therefore it is, that their security especially be provided for. This, faith Quintillian, is the fate of such as sit at the Stern of Government, that they cannot discharge their duty faithfully, nor provide for the public safety, without the envy of many. (And for this cause are the perours of Kings guarded with such severe Laws, which seem, like Draco's, to be wrote in blood.) As may appear by those enacted by the Romans, for the security of their Tribunes, whereby their persons became inviolable. Amongst other wife Sayings of the Effien, this was one, That the persons of Kings should be held as fa, And that of Homer was as notable, 

His chiefst care was for the Kings, That nothing should endanger him.

And no marvel: For as St. Chrysostom well observes, If any man kill a Sheep, he but lefins the number of them; but if he kill the Shepherd, he dispirates the whole Flock. The very name of a King, as Corinns tells us, among such Nations as were Governed by Kings, was as venerable as that of God: So Aristotle the Perfon, Amongst many and those most excellent Laws we have, this seems to be the best, which command us to adore our Kings as the very Image of God, who is the Saviour of all. And therefore as Plutarch speaks, In fact, we see written at Regis corporis mentis inferre, It is not permitted by the Laws of God or Man, to offer violence to the person of a King. But as the fame Plutarch in another place tells us, The principal part of Valour is, to save him that gives all. If the Eye observe a blow threatening the Head, the Head, being undermined by Nature, insensibly is lost. Seeing the safety of the Head (whereupon all the other members depend) before their own. Wherefore, as Cassiodore notes, He that with the left of his own life, redunds the life of his Prince, does well; if so doing he propose to himself the freeing of his own soul, rather than that of another man's body; for as Confurrence teacheth him to express his fidelity to his Sovereign, doth right reason infect him to prefer the life of his Prince, before the safety of his own body: But here a more difficult question ariseth, as namely, whether what was lawful for David and the Maccabees, be likewise lawful for us Christians? Or whether Christ who so often enjoyns us, to take up our Cross, do not require from us a greater measure of patience? Surely, where our Superiors threaten us with death upon the account of Religion, our Saviour advised us such as are not obliged by the necessiary duties of their calling to reside in any one place, to flee, but beyond this, nothing. St. Peter tells us, That Christ in sufferings left us an ensample, who though he knew no sin, nor had any guilt found in his mouth, yet being reviled he reviled not again; when he suffered, he threatened not, but reviled him to that man justly regarded. Nay he advised us to give thanks unto God, and to rejoice when we suffer persecution for our Religion: And we may read how mildly Christian Religion hath grown and been advanced, by this admirable gift of patience, wherefore so injured to those ancient Christians, who living in or near the times of either the Apostles themselves, or men truly Apostolic, must needs be well instrued in their Discipline, and consequently walked morally accordingly to their rules, yet suffered death for their Faith; how injurious lay to these men, what could they have, but that they wanted not a will to relit, but rather a power to defend themselves at the approach of death? Surely Tertullian had never been so imprudent, nor so impudent, as so confidently to have affirmed such an untruth, whether he knew the Emperor could not be ignorant, when he wrote thus unto him, If we had a will to take our private revenge, or to act as public Enemies, could we want either numbers of Men, or floods of war-like Provisions? Are the Moors, Germans, Parthians, or the People of any one Nation, more than those of the whole World? We, though Strangers, yet do fill all places in your Dominions, your Cities, Islands, Castles, Forts, Assemblies, your very Camps, Tribes, Courts;
Courts, Palaces, Senators; only your Temples we leave to your females. For what war have we always declared our fellows fit and ready, though in numbers of men we have sometimes been very unequal? It was contrary to our laws, that we suffer death so meekly, so patiently, but that we are infuribled by our Religion that it is much better to be killed than to kill? Cyrius also treating of his Malters' rights, openly declares, That it was from the Principles of their Religion, that Christians being apprehended made no resistance, nor attempted any revenge for injuries unjustly done them, though they wanted neither numbers of men, nor other means to have resisted. But it was their experience of some Divine Providence that would fall upon their Persecutors, that made them turn patient, and that persuaded the Innocent to give way to the Necessit. So LaCantar. We are willing to confide in the Majesty of God, who is able as well to revenge the contempt done to himself, as the injuries and bandits done unto us: Wherefore though our sufferings be such as cannot be expressed, yet do we not utter a word of discontent, but refer our felwe wholly to him who judgeth righteously. And to the same Tune sings St. Augustine. When Princes err, they presently make Laws to legitimate their errors, and by those very Laws they judge the Innocent who are as length Crowned with Martyrdom. And in another place, Tyrants are so to be encircled by their Subjects, and hard Masters by their Servants, that both their temporal lives (if possible) may be preserved, and yet their eternal safety carefully provided for. Which he illustrates by the examples of the Primitive Christians. Who though they then suffered upon earth as Purginius, and had a sufficiency of Nations to afflbit them, yet these rather patiently to suffer all manner of contumely, than willingly to revile their Persecutors: Neither would they fight to preserve their temporal lives, but these rather not to fight, that they might escape into themselves an eternal. For they endured Begrts, Stripes, the Ten-days Sentence, the Rack, the Fire, the Crofs, they were fed & drink, killed, and quartered, and yet they multiplied; they offered this life not worth the taking for, so ENJOY the life of this world, much less what so eagerly they passed after, a better. Of the same opinion was Cyril, as may appear by many memorable things of this his upon that place of St. John, where he rents of Pere's Sword. The Theban Legion, which we read, consist of six thousand, six hundred, sixty six Soldiers, and all Christians, who wrote the Emperor Maximianus, would have compelled the whole Army to sacrifice to Idols, first removed their Station to Agennus: and when, upon fresh orders sent after them, they refused to come, Maximianus commanded his Officers to put every tenth man to death, which was easily done, no man offering to resist: At that time, Mucmucus (who had the chief command in that Legion, and from whom the Town of Agennus in Switzerland was afterwards called St. Mucmucus, as Eucherius, Bishop of Lyons, records) thus bespake his Fellow Soldiers, Hor fearful was I left any of you under the pretence of defending your selves (as was espe for men armed as ye are to have done) should have attempted by force to have refrained from death these blessed Martyrs? Which had you done, I was sufficiently instructed by Christ. own example to have forbidden it, who expressly commanded that Sword into its sheath, that was but drawn in his own defence, thereby teaching us that our Christian Faith is much more precious then all other Arms. This Tragick Act being past, the Emperor commanding the same thing to the Survivors, as he had done before to the whole Legion, they unanimously returned this answer, Tu quidam, Caesar, Alires suns, &c. We are thy Soldiers, O Caesar, we took Arts for the defence of the Roman Empire, we never yet defeated the War, nor betrayed the trust reposed in us, we were never yet branded with fear or cowardise, but have always off our true commands, until being otherwise instructed by our Christian Laws, we refuse to worship the Devil, or to approach those Altars that are all polluted with blood. We find by thy Commands, that thou refusest either to draw us into Idolatry, or to affliat us by putting every tenth man of us to death: Make no farther search after those that are willing to be concealed; but know that we are all of us Christians, all our Bodies that have indeed under thy power, but our Souls, are subject only to Christ our Redeemer. Then Eucherius being the Standard-bearer to that Legion, thus bespake them, Hitherto, Fellow Soldiers, I have carried the Standard before you in this secular War, but it is not unto these Arms that I now invite you, it is not unto these Arms that I now invite you, it is not unto these Arms that I now invite you, it is not unto those Wars that I now invite you, for now we are to prolife another kind of warfare, for with these weapons ye can never impose your way into the Kingdom of Heaven. And by and by he sends this message to the Emperor, Against thee, O Caesar, Separation it self (which otherwise makes even Cowards valiant) cannot prevail with us to take Arms: Behold we have our weapons fast, yet will we not resign, because we chuse rather to be killed by thee then to overawe thee, and to dye innocents, than to live Rebels to either God or thee. And a little after he adds, Tela precipitous, &c. We abandon our Arms, O Emperor, and will meet thy Messengers of Death with naked breasts, yet with hearts strongly imprinted with Christian Faith. And presently after followed that General Malfacre of the Theban Band, whereof Eucherius gives this Narrative, It was neither their Inocence, nor their Numbers, that could exempt them from death, whereas in other more dangerous tumults, a multitude though offending, are rarely punished. The same story in the old Martyrology we find thus recorded, They were everywhere wounded with Swords, yet they cried not out; but disclaiming the use of their Arms, they exposed their Brasids naked to their persecutors: It was neither their numbers, nor their
their experience in War, that could persuade them to affect the Equity of their cause by their Swords, but placing his example always before them, who was led to the slaughter dumb, and like a Lamb to be Sacrificed, opened not his mouth; they also in imitation of him, like the Innocent Flock of Christ suffered themselves to be worried and torn in pieces by an herd of Persecuting Wolves. Thus also do the Jews of Alexandria telleth their Innocency before Placens. We are, as thou seest, unarmed, and yet we are accused unto thee as publick enemies to the State. These hands which nature hath given us for our defence, we have caused to be pinioned behind us, where they are of little life, and our breasts we expose naked to every man, that hath a mind to kill us. And when the Emperor Valens cruelly Persecuted those Christians, which according to the Holy Scriptures, and the Traditions of the Ancient Fathers, profess Christ to be his Saviour, that is, Confess with the Father; though there were everywhere where great multitudes of them, yet did they never attempt by Arms to secure themselves. Surely, whereverof patience in times of perfection is commended unto us, there we find Christs own example held out unto us (as we read it was to the Thebean Legion) for our imitation. As therefore his Patience, so ours, shoul have no bounds nor limits but death itself. And he that thus lotheth his life, is truly fald by Christ himself to find it. Thus having sufficiently proved, That he that is invested with the Supreme Power ought not to be refit. Now I must admonish our Reader of some things, wherein he may mistaKe, by judging that thofe men do daft their feet agatn this fione, who indeed do not.

In the first place therefore, Thofe Princes that are under the body of a people, whether they originally retained fuch a power, or by fome after contract or agreement made with them, as in Lacedæmon; if they do violate the Laws, or wrong the Commonwealth, may not only by force refiit, but if it be neceefary, may be punished with death: As it befel Pausanias King of the Lacedæmonians, of whom Plutarch thus, The Spartans taking to hear the death of Lyfander, sentenced their King to death, becaufe leaving Lyfander out of Cowardife, whom he was fent to relieve, he had feld for safety to Tegra. The like records in the life of Sylla, The Spartans, faith he, depofed fome of their Kings, as being unfit for Government, because they were of low and abject Spirits: Yea, and of Agis he reports, That being their King, yet was condemned, though unjustly. Now seeing that there were in Italy divers fuch Kingdoms, it is no marvel that Virgil, having first recorded thofe many wicked Acts done by Mezentius, adds,  

'Th' Hetur'ans therefore, all in a just rage,  
To bring their Kings to Judgement doe engage.  

Of whom an old Heturian South-fayer, spake thus,  

——Whom their just Woe  
Arms, as againft a Foe.  

Secondly, If a King or any other shall renounce his Empire, or manifestly forfaile it; against fuch a Prince or King, after that time, any thing is lawful, that may be done to a private man. But this then we must obferve, That he that is careful and negligent only in his Government, cannot thereby only be judged to have forfaile it.

Thirdly, It was the opinion of Barkley, That if a King would alienate his Kingdom, or fubjeft it to another, he loft it. But here I make a fland, For if the Kingdom be Elective, or defcended by Succeffion, fuch an Act of Alienation is in it felf null. And whatsoever is in it felf null can have no efedt of a juft Right. Wherefore, as alfo of that Kingdom that is barely unfeftiruant, whereunto I have likened fuch a King, the opinion of the Civilians is to me moreprobable, That in yielding up his Kingdom to a ftranger he confers nothing? And whereas it is faid that the fruits and profits revert to the Lord of the propriety, It is to be underfood, after fuch a time as is prefixed by the Law. Yet notwithstanding, if a King fafh real endeavour to deliver up, or fubjeft his Kingdom to another, I doubt not but that in this cafe he may be refited: For Empire is one thing, and the manner of holding that Empire another. The alteration whereof the people may hinder; for that is not comprehended under the notion of Empire. Whereunto may that of Seneca be not unfitly applied: Although our Father be in all things to be obeyed, yet not in thofe things wherein he ceaffeth to be a Father.

Fourthly, as the fame Barkley obferves, If a King fafh endeavour, with a mind truly holy-lie, the deftitution of the whole body of the Nation over which he is fet to govern, he loathe his Kingdom and may be refited: Which I grant. For the end of all Government being for mutual conservation, he that wilfully resolves to deftoy, can have no right to Govern. Wherefore he that openly, either in word or deed, profefth himself an enemy to the whole Nation, is in that very act presumed to abjure and renounce the

Chap. iv. In what cases Subjects may take Arms against their Prince.

VIII.  
That a free people may make War againft their Prince.

IX.  
Or against a King that hath renounced his Kingdom.

X.  
Or against a King that would alienate his Kingdom.

XI.  
Or a King that invades the whole body of the people in an hostile way.
the Government of it. When Scylla had depopulated not Rome only, but almost all Italy, one seriously advised him, that it was fit to spare some, that he might have some to govern; but this case can hardly be found in any King that is of found mind, and that governs one only Nation. But in case he governs more than one, it may so happen, that in favour to one, he may endeavour to destroy the other, so he may plant it with new Colonies. Gracchus his Arguments are very Ingenious, whereby he proves, that a Tribune of the people (being therefore accounted sacred and inviolable, because he is consecrated by the people to defend them) in case he shall endeavour to oppress them, to diminish their power, and to take from them their rights of suffrage; both thereby actually degrade himself, in not performing that for which that honour was conferred on him. For to admit (faith Gracchus) that the Tribunes of the people may in some cases imprison their Consul; and yet to deny that the people have a power to take away the Tribunitial power from him that abuseth it, even against those from whom he received it, seeing that both the Consul and the Tribune were by the people created, would be very absurd. The like we find asserted by Johannes Major, namely, That a people cannot abdicate their power of deferring their Prince, in such cases as tend to their manifest destruction. Both which may be very well expounded by what hath been herein already delivered.

Fifthly, In case a Kingdom be confiscate either by Felony committed against him whole the Fief is, or by any clause or condition expressly made and agreed on at his admission on the Kingdom. As in case the King shall do this or that, his Subjects shall then stand abided from all obligation of duty and obedience unto him. In this case also a King may recede into the condition of a private person.

Sixthly, If a King having but one part of the Soveraign power, and the Senate or people the other, if such a King shall invade that part which is not his own, he may justly be force relitified, because in that part he hath not the Soveraign power: Which I believe may take place, although it be said, That the power of making War is in the King. For this is to be understood of a Foreign War; since otherwise, whosoever hath any part of the Supreme power, cannot be denied a Right to defend his own even by force, which when it happens, even the King himself may justly by the Right of War, lose even his own part of the said Empire.

Seventhly, If in the Tranlation of the Empire it be expressly said, That upon some certain events that may happen it may be lawful to make restitution. For although it could not then be conceived that by that agreement any part of the Soveraign power was intended to have been retained; yet certainly it may be conceived, that some kind of natural Liberty was thereby understood to have been referred to the people, and exempted from the power of the King. For possible it is for him that alienates his own Right, to diminish and decurt the Right that he gives by certain clauses or Articles of Agreements, whereof we may find in Histories many examples.

We have hitherto treated of him who hath or had a Right to Govern; now something we must lay of him that invades or usurps the Government, not after he hath either by long possession, or by Consent or Agreement obtained a Right unto it, but so long as the cause of his unjust acquisition continues. And certainly, during the time that he pollutes the Empire, his Acts may have power to bind: But yet, not as they are his, for Right to command he hath none, but upon this premouption, That he who of Right should govern, were his King, People or Senate, had rather that his Laws for that time should bind, than that the People should live altogether without Laws, and without Judgements, which must necessarily introduce the greatest disorder and confusion. Cicero condemneth Sylla's Laws as too cruel against the children of those that were proscribed, in making them incapable of suing for Honours; yet he thought fit, that those Laws should be observed: Affirming (as Quintilian tells us) that the flate of the Common-wealth was so contained in those Laws, that if they were not kept, the Common-wealth at that time could not have subsisted. Florus also concerning the Acts of the fame Sylla, faith thus, Lepidus went about to refund the Acts of this great man, and indeed not without cause, if at least, he could have done it, without the ruine of the Common-wealth. And by and by, it was expedient for the Common-wealth, being then sick and wounded, to be governed by any Laws whatsoever, rather than to free and scarcep her Wounds by attempting an untimely Cure. Yet notwithstanding at such times, and in such Cases wherein our obedience is not to exquisitely necessary, and yet may help to confirm the Ufurer in his unjust posession: If by our disobedience we incur no great danger, we must not obey. But whether it be lawful for the people by force of Arms to defect him that hath thus usurp the Soveraign power, or to kill him, is disputable.

And in the first place, If he that usurps another mans domnination have not gained it by a Jiit War, that is, by such a War as hath all the Rights required by the Law of Nations; nor by any contract or agreement made with him, or Faith given to him, but that he holds
Whether an Usurper may be killed.

holds his peace. He by force only: The Right of War seems in this case to continue; and therefore what may lawfully be done against an enemy may lawfully be done against him, whom any private man that hath not given his Faith to him, may lawfully kill. In reo Magnificent & publicis hostes omnes homo miles est: Against Traitors and public Enemies every private man, faith Tertullian, is a Soldier. So against such as desert their Colours in the time of War, it is indulged unto every man to take publick revenge in order to the common safety.

The same may be said if before such an Invasion there were extant any such Law, authorizing any private man to kill him who dares in his presence commit such or such a fact. As for example, if being but a private man he shall go with a guard about him, or if he shall attempt a Fort, or kill a Citizen uncondemned, or illegally condemned, or if any man shall presume to create a Magnifrate without just suffrages. Many such Laws we may read of to have been in force among the Cities of Greece, with whom it was also lawful to kill such Tyrants. Such was that Law of Solon in Athens, renewed after his return from Pisa, against such as had abolished Popular Government, or that after such abolition had born any office. The like Law there was also in Rome, called the Valerian Law, against any man that should assume the office of a Magnifrate without the peoples consent, making it lawful for any man to kill such a man uncondemned, as Plutarch relates, where he thus distinguishes Solon's Law from that of Publicola: Solon would have such a man legally convicted; but Publincola permitted any man to kill him that usurped the office of a Magnifrate without any formal Process. And such was the Consular Law, immediately after the Decennial Government, That no man should create a Magnifrate without an Appeal; and he that created such, might be judged by the Laws both of God and Man be killed.

No less lawful it is for him to kill an Usurper, that hath an express Warrant to do from the People to whom the just Right of Government belongeth, whether it be in the King, the People, or the Senate. Amongst whom likewise we may place the Protectors or Guardians of Kings during their minority: Such as was the order to King Josiah, at whose command Abital was deprived at once both of her Life and Kingdom, 2 Chron. 23.

Now unless it be in one of these Cases, I cannot perceive how it should be lawful for any private man by force either to deject, or to destroy him that usurps the Imperial Dignity: Because possible it is, that he who hath the true Right had rather prefer the peace and tranquility of his Subjects, though under the Usurppers power, than embroil his Country in blood, or to vex his Subjects with Civil War, which are the sad and bloody effects and consequencies that attend the Murder or Expulsion of Kings, especially if his quarrel be espoused, by either a strong Faction at home, or powerful Friends abroad: Or because it is at least doubtful, Whether that King, People, or Senate, in whom the Right of Empire is, are willing that the matter should be brought to so desperate an issue. And without the precise knowledge of this, all violence of this kind is unjust. It is very true, what Favorinus in Plutarch observes, Peace is better than the Disorder of Domination illegal: An Intense War is more destructive than any Tyranny. For though the Rage of Incensed Tyrants may produce more Tragical effects upon some particular Families, yet the Destruction of Civil War spreads farther, continues longer, and leaves more dreadful prints behind it, than any Tyranny. Give me any peace, faith Church, rather than a Civil War, Titus Quinctius told the Lacedemonians. That it would be much better for them to bear with the Tyranny of Nabis, than by endeavouring with Arms to recover their lost Liberty, to make the Tyrants Grave in the ruins of their City. And to this purpose was that prudent advice of Ariiphantes, Leo in Civitate non est alius: si divitis sit, ferendus est: Either not to nourish a Lion, or being nourish, not to provoke him. It is indeed a very difficult cafe, and will admit of a strong debate, Whether Peace or liberty be most acceptable: Cicero makes this question, the most difficult of all others in the Politicks to be resolved, Whether our Country be oppressed by Tyranny, we may attempt to redeem it, although with the danger of its defeasance. But it is not for private men to determine what the Common Judgement of the people would be in this case, but this we abominate as being grossly unjust: to make our Countries Liberty a cloak for our own Ambition; and to pretend to deliver her, when we intend to Inflame her. Sylla being demanded, Why he marches into his own Country so strongly Armed: anwered, Ut eam ad Tyrannis liberam: To deliver it from Tyrants: When he that pretended so, was himself the greatest Tyrant. So Antiochus brought a Mighty Army into Greece, alleging that he came to set Greece at Liberty, when indeed it wanted none. His pretence, was Liberty, but his Intent, Tyranny. Cruelitas Domnar & crudelitatis animi; By condemning Tyrannus, he trapanthem into it: It was much better Counsel, that Plato gave to Pericles, which Plato thus renders, That he should attempt no more in the Commonwealths, than he could justify to his Subjects: For that nothing favouing of force or violence should be endured upon either our Parents or our Country. To the same Tenor is that of Salo•, Though they could not govern thy Country or thy Parents by force.

By the Right of the War continued.

Vulgar Apece.

XVII. Or by virtue of some antecedent Law.

XIX. Why an Usurper may not be killed, but in one of these cases.

Lit. IV.

Pita Brati.
Who may lawfully make War.

BOOK I.

66

force, and correct at thy pleasure every small offence, yet would it seem harsh and troublesome, especially considering that no violent thing can be permanent, nor any Mutations of Government, without violent Commotions, War, Rapine, and such like acts of hostility. Not much different from this is that of Statius in Plutarch, It becomes not a wise or a prudent man to endanger himself in Popular Troubles, amongst either Fools or Knaves. Whereunto we may also not imprimitually refer that of St. Ambrose, This also will highly advance thy Credit and Reputation, if thou canst relieve the poor out of the hands of the Oppressors, and deliver him that is wrongfully condemned to die; so that thou do without raising Tumults or moving Sedition: Left otherwise thou hast so seem to do it rather out of an effectuation of Popularity and Vain-glory, than out of Pity and Commiseration, and so consequently make those wounds deeper which thou shouldst best. It was the opinion of Aquinas, That the pulling down of Government though Tyannical, was sometimes Seditions. Neither are we much moved to the contrary, by that fact of Ehud to Eglon King of the Moabites. For the Scriptures plainly tell us, That God raised up Ehud to deliver Israel: What Ehud did was done by the special Warrant of God himself. Neither doth it appear, That this King of the Moabites had by Agreement no right of Sovereignty. For God we read did execute his Judgments even against other Kings by such Instruments, as he himself was pleased to raise up to that purpose, as may be collected by Jehu against Joram, 2 Kin. 9.

But it is especialy to be noted, That no private person ought to determine Controversies of this nature, but should rather obey the precent polisfor. As Christ commanded to pay Tribute to Cesar, because his Image made the Money currant; which was a convincing argument that he was in full possession of the Empire at that time: For the Coining of Money was ever the most certain sign of the Possession of the Empire.

CHAP. V.

Who may lawfully make War.

I. The Efficient Causes of War are either the Principals in their own cause:

II. Or in the Cause of another.

A

in all other things, so in Actions that are voluntary there are three sorts of Causes efficient, that is to say, Principal, Auxiliary, and Instrumental. The Principal efficient cause in a War is for the most part he whole the quarrel is: In a private War, any private person: In a publick, he that hath the publick Power, especially if it be Supreme. Whether a War may be justly undertaken in the behalf of another, not making War, shall be difficult hereafter. In the mean time this is most certain, That naturally every man hath a Right to revenge his own quarrel, and for this cause were hands given unto us.

Neither have we a Right to vindicate our own quarrels only, but we may both lawfully and laudably improve our Right to the vindication of other mens alle. They that treat of Offices say truly, That there is nothing fo useful and profitable unto man, as another man. There are several obligations, wherein we stand bound to one another for mutual help and assistance; For kinmen do uniformly combine to help one another: So one Neighbour being oppressed invokes the help of another: So also do Citizens the aid of their fellow-Citizens. Aristoteles thought it a duty incumbent to every man to assume Arms, either to defend himself, in case an injury were offered him; or to assist his Kinmen, his Benefactors, or his Companions, in cases of oppression. And in Solon's eleemente, That was the bell Common-wealth, wherein every man was as sensible of Injuries offered to another, as if they had been offered to themselves: Hence is that of Pllinus, Pretorquete Injuria prius Collum quam ad vos perveniat: Break the Neck of an Injury before it comes at us. But though all other obligations should fail, yet it is sufficient that we are link together in the common flock of humanity. For, ab homine nihili humili alternus; Nothing that is incident to humane nature, should be to any man strange. Democritus tells us, That it is a duty incumbent to every man, so far as he is able, to succour all that are oppressed with wrong, and not at all to neglect it: For this, faith
faith he, is both just and honest: Which Laertius thus expresseth, God, faith he, who denied to all other creatures Wisdom, furnished them with such natural Muniments, as were sufficient to defend them from violent incursions and sudden dangers: But unto man, being sent into the world naked and unarmed, the better to instruct him in Wisdom, hath God, besides other endowments, given him Natural affections, whereby we are taught to love, cherish, and defend each other, and readily to give and receive aid and assistance one to, and from another, against all outward assaults and dangers whatsoever.

By Instruments here, we mean not Arms or such like, wherewith we either offend others, or defend our selves: But such voluntary Agents, as are contented to receive directions from others. Such as a Son is to his Father, being a part of himself naturally; or as a Servant to his Master, of whom he is legally a part. For as a part doth not only refer to the whole in the same relation, as the whole is the whole of the part; but this very thing that it is, is the whole: So Possession is said to be something of him that possesses it. And Servants, faith Democritus, are to be used as we do the members of our body, some to one purpose and some to another. Now what Servants are to a Family, the same are Subjects to a Common-wealth, and so are as Instruments to him who hath the Supreme power.

Without doubt, Naturally all that are Subjects may be employed in the War, though some special Laws may excuse some; as heretofore Servants among the Romans, and now everywhere the Clergy: As the Levites among the Jews were not liable to the duties of War (as Josephus testifieth) which Law notwithstanding, as all others of that nature, must admit of the exception of extreme necessity. And let this suffice to be spoken in general concerning Subjects and Servants: For what more especially concerns them, shall be handled in their proper places.
Hugo Grotius

OF THE

RIGHTS

OF

PEACE & WAR.

BOOK II.

CHAP. I.

Of the Causes of War, And, First, of War made in our own defence.

I. What Causes may be said to justify a War.
II. That they arise either from our own defence, or from requiring what is our own, or is due to us, or from punishment.
III. War made for the defence of our Lives, lawful.
IV. Against the Aggressor only.
V. In such dangers as are imminent and certain, not in such as are opinionative only.
VI. War made in defence of our Limbs, lawful.
VII. Especially in defence of Charity.
VIII. War made in defence of our selves, may sometimes be omitted.
IX. Our defence made against a Person publickly very profitable, sometimes unlawful by the Law of Charity.
X. To kill a Man for a Box on the Ear, or for some such reproach, or rather than flee; not lawful for a Christian.
XI. To kill a Man in defending our Goods, by the Law of Nature not unlawful.
XII. How far permitted by the Law of Mooses.
XIII. Whether, and how far permitted by the Evangelical Law.
XIV. Whether the Civil Law, permitting a Man to kill another in defence of himself, do give a right so to do, or only an impunity, explained by a distinction.
XV. When Duelling may be lawful.
XVI. Of defence in a War that is publick.
XVII. If only to weaken the growing power of a Neighbour Prince, the War be to be reputed unlawful.
XVIII. The defence of him who hath given just cause of a War, is likewise unlawful.

LET us now proceed to the Causes of War: I mean those that justify a War; for there are others that excite men to War under the notion of Profit, which are sometimes distinct from those which excite upon the account of Justice; which as well between themselves, as from the beginnings of War, (such as was the Hart in the War between Turnus and Eneas) Polybius doth accurately distinguish. And though the difference between these are manifest, yet are the terms usually confounded: For even these causes which we call justifying, Lieves, in the Oration of the Rhodians, calls the beginnings of the War; Surely ye (say the Rhodians) are those very Romans, who pretend that your Wars are therefore successful, because they are just; and that glory, not in the event, that ye can conquer, but in the beginning, that ye never make War but upon just cause. And indeed there was hardly ever any Nation that
that did so long pride themselves in the justice of their quarrels, as the Romans did. The Romans, faith Polybius, took very great care not to begin a war with their neighbours, and would have all men believe that they never made war but to repel injuries. This Dion testifies in that notable comparison he makes between the Romans, and Philip of Macedon, and Antiochus. And elsewhere he tells us, That the Romans took special care that their wars should be just, nor did they ever averse a war rashly, or without just cause. In the same fence doth Aelian call the Causes of War, the beginnings of War: And Dirodorus discoursing of the war between the Macedonians and the Athenians, makes the pretences and the beginnings of the War to be the same. These justifying Causes of War are the proper Argument of our present discourse, whereunto that of Carthage in Halicarnassus is pertinent, Let your soft and principal care be, that the ground of all your wars be just and just. So is that likewise of Democritus. As in the building of houses, Ships, and such like, the Foundation or Ground-work should be firm and lasting, (otherwise the Superstructure will soon decay and rotter.) So in all our Enterprizes, Justice and Truth should lay (as it were) the first stone, if we expect that the success should be honorable. No less pertinent to this purpose is that also of Dion Cassius. In all our Wars let our chief regard be to Justice; for if the lead up the Van, true colour may bid fair for the victory: But if she be wanting, though our soft attempts flutter us, yet will the end prove inglorious. And that also of Cicero, Those wars are unjust that are undertaken without cause. And therefore in another place he sharply reproves Cassius for palling with his Army over Euphrates, when there was no just cause of War given, which holds true no less in publick wars than it doth in private. Hence arise that complaint of Seneca, Do we refrain Homicidium, and punish Murderers, and yet oftentimes the depopulation of whole Nations glorious? Our overflights and Cruelly know no moderation. Commissions are every day sent out by the Senate and People to execute Acts of Cruelly, and which are privately forbid me publicly commend. Homicidium committuntur singulis, crimine est: virtus oportuit, eum publice gerere: When a private man commits a murder he is punished as a Criminal, but when thousands are publicly taken away and destroyed, it is infinitely condoned for virtue and honour. It is true indeed, That War being undertaken by publick Authority, like the definitive Sentence of a Judge, hath some effects of light (whereof more anon.) But yet are they not altogether blameless, unless there be a just cause to warrant it. Thus was Alexander for Invading the Persians and other Nations without cause given, defectively censured by the Sphynx in Curiosityc, and elsewhere by Seneca, for a Robber, and by Lucan for a Thief, by the wise men of India as a Scourge to all Nations, and the common pelt of mankind; and before that by a Pirate, for the greater Pirate of the two. So justin speaking of his Father Philip, faith, That two Kings of Thrace were thrust out, and deprived of their Kingdoms through the fraud and villany of a Thief: Whereunto we may likewise refer that of St. Augustin, Remota justitia, quid sint Regna nigra Latioaminis, Take away Justice, and what are Kingdoms but great Robberies. With whom accords that of Lucretius, Inani gloria specie capri, saeculorum fas virtuosi nonum impotent, Being blinded with self-love and vain glory, they misuse all their virtue's voices. Nor was justin Martyr much amis, when he said, What Vices do in deserts places, the very fame do such Princes who prefer Opinion before Truth. Now other just causes of making war there can be none, but injuries: So St. Augustin, The wrongs done on the one side, make the war done on the other side just. So also faith the Roman Herald, I do resolve and declare, that such a people are unjust and have not done us right; thereby intimating, that the people of Rome might justly make war upon them.

Now look how many causes there are of civil Actions, so many there are of a just war; for Vbi defunt Justicia, incipitur Bellum: Where Judgments cease, War begins. Now at the Law, Suits arise either for prevention of Injuries not yet done, as when Cautions and Securities are required, that no acts of violence shall be offered, nor any damages done us; or for injuries already done, as namely, that they may be recompened, or the person injuring punished. But as to that which comes under the notion of Reparation, it refers either to that which is, or was ours, from whence arize vindications and some personal Actions; or to something that is owing and justly due unto us, whether by some contract or agreement, or for some hurt done unto us, or by the Law, whither also we are to refer those things, which are said to arise, as if they were due by contract or by some wrong done unto us; from which heads arise the other conditions: That which concerns Facts to be punished, requires, First, An Accusation, Secondly, Courts of Judgment. Most men assign three just causes of a War, namely, for Defence, for recovery of what is ours, and for punishment: which three we shall find summed up by Camillus in his denouncing War against the Gauls, Omnia que defendi, repeteque & ulterae fas sit; All which may lawfully be defended, recovered, and revenged. In which enumeration, unless we take the word, Recovered, in its larger signification, it will not include the exacting of that which is due unto us; which was not omitted by Plata, when he said, That war might be justly made, not only when a man is oppressed by violence, or when he is polluted, but when
when he is fraudulently dealt with, and so deceived of what is his due. Wherein he
accords that of Scipio, Aquilina vox est, & jus Gentium pro fereos, Redde good deserer, This
is a righteous saying, and consonant to the Law of Nations, Pay what thou ow'st. And it was
a clause always inserted in that form used by the Roman Heralds, Room nec detenter, nec
sovereign, nec fercorun, quas dari, fieri, solvi appetunt. That they neither gave, end, nor paid,
what they ought to have given, paid, and done. So likewise Salath in his History, Fite Gen-
tium res repetit. According to the Law of Nations, I require what mine own. Servum upon
Virgil's Aeneads tells us, That when the King of the Heralds was sent to denounce war, he came
to the borders of the enemies Country; and after some ceremonies, cried out with a loud voice, That
he denounced War against them for such or such causes; either because they had wronged their Affi-
sociates, or because they had not restored something unjustly taken away, or that they had not de-
cerred their injuries offenders to be punished. And when St. Augustin faith, That just Wars are usually
thus defined, Salut nec causatur, Which revenges injuries: He takes the word, to re-
venge it in its general signification, for that which includes also, To take away, as may ap-
ppear by the words following, which do not express an enumeration of parts, but an illus-
tration by examples. So That Nation (faith he) or City may by Arms be assaulted, which
shall neglect either to punish their own Subjects for injuries by them done, or to restore that which by
force was taken away. And by this light of Nature it was, that the King of the Indies (as
Diodorus relates) accused Sempronius for the breach of the Law of Nations for making war
upon him, without any injury at all done her. For, as Josephus faith, They offer evidence
to them that live peaceably, do but enforce them into Arms to defend themselves. Thus do the
Romans plead with the Senates, They ought not to have invaded them, having no ways
wronged them: For men, faith Arifiotae, do not usually make war, but upon whom have felt
injured them. As Curtius telltis of the Abian Scythians, the most innocent of all the Barbar-
ians, Arms abiligentem nisi laezcit. They never made war, unless highly provoked. And
Pitarch of Hercules, That being thoroughly provoked, he subdued all in his own defence. The first
cause then of a just war are injuries not yet done, that threatens imminent danger to
our Persons or our Estates.

That it is lawful for us to destroy him by war, that would otherwise destroy us; or at
least draw us into imminent peril of our lives, hath already been proved. Now it is to
be observed, That this right of defending our selves both principally and primarily
arise, not from the malicious attempts of the Aggressor, but from the right that Nature
gives unto every creature to preserve it self: So that although he by whom our lives are
so endangered be without blame, as the Soldier in doing but his duty, or hapy a man
making me for another, or being mad, or in a dream (as we have read of some to whom
it hath thus happened) yet shall not my right to defend my self thereby be taken away.
For to justify me it sufficeth that I am not bound to suffer that which he attempts to do
against me, no more than if a wild beast should attempt to worry me.

But what if some innocent persons are so intercepted, that I cannot preserve mine own
life either by flight or just defence, unless I either kill or trample upon them, may I justly
do it? There are some (even among Divines) that hold I may ? And certainly if we hear-
k'en to the dictates of Nature alone, she will persuade us to prefer our own safety before
our respect to society. But the Law of Charity, especially the Evangelical Law, which
commands us to love our Neighbour as our selves, doth not permit it. It was notwithstanding
very well said of Aquinas, if he be rightly understood, that in a true defensive
war, we do not intentionally kill others; but that it may sometimes be lawful, if all
other means of safety fail to do that purposely whereby the Aggressor may die. But
that this death was not our choice, nor intended primarily (as in capital punishments) but
our last and only refuge, there being no other visible means then left to preserve our own
lives, but by killing him that seeks to kill us; nay and even then, he that is thus violently
assaulted ought to with rather that some other thing would happen, whereby the Aggrec-
for might be either alighted or some ways disabled, than that he should be killed.

It is also here required, that the danger be present and ready instantly to fall upon us:
As when a man shall furiously assault another with a drawn Sword, or snatch up any
weapon with a manifest purpose to kill him, I confess that in this case he may lawfully,
by way of prevention, kill him. Thus Phrynichus in Thucydides pleads, He must needs be
void of malice, who being reduced by them into so great jeopardy, did attempt this, or that, or
any way to free himself, rather than suffer himself to be destroyed by these malicious men: For as
well in Morals as Naturals, it is not possible to find a point without some latitude, but
they are much mistaken, and do apt to mislead others, who think their own fears, how
ever occasioned, sufficient to justify the killing of any man by way of pre occupation, as
though it were in their own defence. For it was well said of Cicero, That many inconse-
quences do usually arise from vain and idle fears, and much mischief we oft-times do unto others,
whilst we fancy that the like was intended against us. So Clearchus in Xenophon, I have known
many so far transported, either through calamity or suspicion, against those they feared, that chu-

fing rather to prevent dangers than to undergo them, they have most miserably afflicted those who never intended them hurt, nor entertained a thought of evil against them. To the same purpose is that of Cato in his Oration for the Rhodians, What we object that they intended to have done against us, shall be by way of Anticipation do against them? It was not only said by Aulus Gellius, To Gladiators preparing for fights, this was the condition proposed; either to kill his Adversary or to be killed by him: But the life of man, faith he, is not best with such hard and unavoidable necessities, as that you must either do, or suffer wrong undoubtedly. For as the same Cato speaks in another place, Who did ever enact such a Law, or what Common-wealth could ever without manifest danger to it self, do so much as tolerate so great an inconvenience, as that one man might lawfully kill another, and then justify the fact by his own unnecessary fears, as namely, left otherwise he should have been killed by him? Very apposite whereunto is that of Thucydid, What is to come is as yet in the Clouds uncertain whether it will fall or not; neither might any man be so far incensed thereby, as to undertake a present and certain war, for that which is as yet future, and so uncertain. And in another place elegantly describing the many inconveniences that were likely to ensue upon those petitions which then began to vex the Graecian Cities, adds this as one, That they prove which of them should first commit those villanies, which they feared another would do before them. Cæsar when he had possified himself of the Common-wealth, pleaded in his own defence, That it was the fear of his Adversaries that had enforced him thereunto. Cuvendo ne mutat homines movendos utro fo efficiant, &c. laith Livy, Pretending to free themselves and their Country from the fear of other men, they voluntarily made themselves formidable; and as if there had been a necessity of either doing, or suffering wrong, we can secure ourselves of our burthens but oppress others. But against these, that saying of Petronius Cripusian, so much celebrated by Quintilian, may be well applied: Quis te sic timere permitat? Who permitted thee thus to fear? Or that of Livia in Dio: Insanam eos non officias, qua facias quod timent occupant. They can never wipe off the stain from their honour, who commit what wickedness which they fear another would do before them. But what if the dangers that threaten us be not imminent, but future, by conspiracy, or by treachery, as by poison, or false accusation, or by false witnesses to procure an unjust Sentence, or the like? I deny that in such cases it is lawful to kill any man, that is, if either the danger may by any other means be avoided, or that it be not sufficiently clear, that it cannot otherwise be avoided: For commonly delays afford us many remedies, and produce many accidents which are unexpected, whereby these dangers may be avoided: Interm of &c. as it were, between the Cup and the Lip. Although there be many, I know, both Lawyers and Divines, that give a larger indulgence in these cases, yet this other opinion doth not want the defence of good Authors, as being indeed the better and safer of the two.

But what if the danger threaten the maiming of our limbs only? Surely since the loss of a limb, especially if it be any of the principals, is very grievous and equivalent to the loss of life it self, and such also as may bring us into the danger of death, if it cannot be otherwise avoided, he that shall certainly endanger it may lawfully be killed.

And without doubt the same may be done in defence of our chastity, seeing that not only in the general repulse of the world, but by the Law of God himself, Chastity is equiballanced with life. The Law (faith St. Augustinus) gives power to the Traveller to kill the Thief, who would otherwise kill him; and to a man or woman to kill him that shall attempt to ravish them, or after the Rape is committed if they can. So Paulus the Lawyer, He that shall slay a Thief or a Ravisher, ought not to be punished, for by a publick and heroic Act, the one defends his Life the other her Chastity. Amongst women that have thus defended their Chastity with the death of him that attempted it, Heliodorus records the noble act of Heracles, which he calls a Just defence of her honour. Another amongst men we have recorded by Plutarch, of one Teobonius, wholew C. Luius a Tribune of the Souldiers, and Marius his own Sifers Son, for attempting to bugger him; for which fact he was by Marius honoured with a Crown.

Although (as we have said) it be lawful to kill him that is ready to kill me, yet is it more commendable to chuse rather to be killed than to kill, which some grant; yet that it be with this limitation, that it excepts that perfon upon whom the safety of many doth much depend. But I cannot judge it fafe to impose this so contrary a Law to patience upon all those whose lives are beneficial unto others; and therefore I think it more convenient to restrain the exceptions to such only, whose office and duty it is to defend others from violence. As to those whom we have contracted with as our Guards, to defend us in our Journeys either by Sea or Land, and to such as are publick Governors, unto whom that of Lucan may not unfitly be applied.
Can tot ab hoc avium popolorum vita salutis
Penetrit, & tantus caput hoc sibi fecerit orbis,
Sevita cfr voluit mori:

Since on thy life so many lives depend,
And wait made Head the Members to defend,
To wish to dye were madness.

As also that of Curtius, Whilfe thou undauntedly exposest thy life to so many perils, thou dost not remember how many of thy Subjects lives thou endangerest, which thou oughtst to defend.

On the contrary, It may so fall out, That the life of him that endangers ours, is so beneficial to others, that he cannot without sin be killed; and that not only because it is forbidden by Gods Law both in the Old and New Testament, which we have already proved, where we shewed that the Person of a King is sacred, but by the very Law of Nature: For the Right of Nature as it signifies a Law, doth not only respect those things which are agreeable to that which we call Expulsive Justice, but it comprehends also the Acts of Fortitude, Temperance and Prudence, as being in some certain circumstances, not only honest and laudable, but strictly due. But unto this that we have said we stand obliged by Charity. Neither am I at all startled from this opinion of mine by what Valspinus urgeth, That the Prince that shall Inflit over an Innocent person, doth into false scale to be a Prince; than which, nothing can be said false, or more dangerous. For as Right and Property, so Sovereignty is not left by mit government, unless some Law doth to determine it. But by what Law was it ever yet decreed, that Kings should lose their Sovereignty, by an offence committed against a private person? Surely there was no such Law ever yet found, nor I believe ever will be: For the condition of Princes would then be very flippery, and the Common-wealth soon fall into Confusion. And as to that which Valspinus lays as his ground work, whereupon he erects this and many other fit dangerous conclusions: as namely, that all Sovereignty was granted, for the benefit of the Subjects, and not of the King, were it universally true, yet were it nothing to the purpose: For the thing it is done not then wholly scale, although the benefit or profit thereof doth in some part scale. And whereas he adds, That every man with his best well to the Common-wealth for his own fake; and therefore every man should prefer his own safety, before that of the Common-wealth, it doth not follow. For although we do with the preservation of the Common-wealth for our own fakes, because our own safety is included in it; yet do we not wish it only for our own fakes, but for the good of others also. For the opinion of those Philosophers, who hold, that true friendship doth arise out of some Indiginity or Insufficiency, is rejected as falle and pernicious, lecing that Man, being a creature natturally licible, is promptly and of its own nature inclinato it. But that I should prefer the common safety before mine own, Charity doth sometimes peradventure, and sometimes command me. Plutarch will tell us, That Valour is, to defend our Defender. And Cæsare illustrates this, by a very fit comparison. If the hand, faith he, by its intelligence from eye, perceive a blow threatening the head, without regard to its own safety, it will interpose itself betwixt it and danger; From whence he infers, That they who to redeem their Prince his life, hazard, may lose their own, but do the same in the Politicks, which the hand by Infliteth doth in the body Natural.

It is no marvel, faith Seneca, if Kings and Princes being the Guardians of publick State, be dearer unto us than our own Relations: For if in the judgement of the Wife, the Lib. de Pubblic Good be to be preferred before any private mans; it will easily follow, That be that is the Father of our Country, deserves to be dearer unto us than the Father of any one Family.

Or as St. Ambrose speaks, He that delivers a Nation from desolation, merits more love, than DeOffic. c. 3. he that delivers us from particular dangers. And therefore the same Seneca doth highly commend Cæsareus and Bullois, the one an Athenian, the other a Roman, who resolutely to have their own estates restored unto themselves by the publick power: esteeming it much better to persevere by themselves, than to redeem their own lives and fortunes with the defamation of their Country.

There are also, that hold it lawful to defend our selves from any flight Injuries, as a box on the ear or the litle, even by killing him that attempts it. But respett being herein had to Justice nearly Explicative, I cannot dissent from them. Although for the Inequality be very great between a box on the ear and death, yet he that shall attempt to injure me, doth therein give me a Right, that is, a kind of Moral power to oppose him without any limitation, so far forth as I cannot otherwise repel or avoid the Evil intended against me. Neither doth Charity by it fell seem to restrain us herein, in favour to the Nocens; Li-

X.

To kill any man for a flight Injury not lawful for Christians.
Of Some his which naturally man it ufe in the law of Na-

Hercules with his own Harp: and being by some arraigned for the Murder, appeals for his indemnity to that Law of Rhadamant, whereby he that wounded another, being by him first affilled, was declared Innocent. But the Christian Law doth clearly forbid it: and Christ himself doth expressly charge his Disciples patiently to suffer any fhall fhock injury though reiterated, rather than to hurt our adversary: How much more doth he forbid them to kill him, to avoid a box on the ear? By which particular Instance, we are sufficiently cautioned against that of Consequences, That Mans understanding being well Instructed in what is naturally Right, will not endure, that any thing should in natural reason be permitted, that is not also permitted by God, who is very Nature it self. For God, who is to the Author of Nature, that he sometimes acts Freely above Nature, hath a right to bound and to limit us by Laws, even in such things as are in their own nature, Free and Indefinite; much more hath he power to oblige us to that which is naturally honest, though not due. But a wonder it is, That since Gods will is in this point so expressly declared in the Gospel, there should yet be found to many Christians, yea, and those Divines, who maintain, not only that for the avoiding of a box on the ear, or such like flight injury, we may lawfully kill our adversary: But that in case he that hath finneter us do fly, yet may we pursue him even to death, for the vindication of our own honor, which seems to be as equatAE from natural reason, as from Christian piety. For, Honor eff opido de excellentia, Honour is an opinion of some Excellency in the person honoured. But he that can suffer such an Injury, doth express himself eminently patient, and by that means doth rather magnifie than diminish his own honour. Neither is it much material, That some men of corrupt Judgements do reproach this Vertue by the name of Cowardice. For those hollow heads can neither alter the thing it self, nor leaffend the reputation of it. Neither was this the Judgement of the Primitive Christians only, but of the Antient Philosophers also, who ever accounted it an argument of a weak and pusillanious Spirit, Not to be able to digest an Injury, as we have elsewhere shewed. And from hence we may collocl, how deedfully their Opinion is to be exploded, who hold it lawful by even Divine Right, (for that it must be by the Right of Nature I deny not) to defend our selves even from mean and flight Injuries by even the death of the person Injuring, although we may without any danger avoid him by Flight, or otherwise: Because it is accounted dishonourable in a Person of Quality to do so; whereas indeed, the scandal is not unjustly given; but by a popular misprifion unjustly taken, and by all those who understand whereof True Valour and Valour do consist, to be confurned. And it doth not a little rejoice me, that herein I have the concurrent opinion of that Excellent Lawyer Charles Melchior amongst others to abett me. Now what is said of a blow on the cheek, and of Flight, the very same may also be said in all fuch cafes wherein our honour or reputation is not greatly wounded. But what if a man shall speak that of us, which being believed, may bafl our credit and esteem with men? Some there are that would perforce us, that we may lawfully kill him also, but very erroneously, and against the Law of Nature: For this is no fit means whereby we may hope to clear our Fame, or to repair our good Name being fullied.

Let us now proceed to those Injuries, whereby we are damniifed in our Goods or Eftates. And if we repect Expletive Justice only, I shall not deny, but that for the conforevation of them, the Robber, if need be, may be killed: For as there is some Inequality between a righteous man and a Thief; so in the judgement of the Law, the Goods of the Innocent are even ballanced with the Life of the Nocean Whence it follows, That if we repect this Right only, a Thief flying away with Stolen Goods, if those Goods cannot otherwise be recovered, may be killed. So Demogogenes in his Oration against Aristocrates. It is not, faith he, a very bad Cafe, and contrary to all Law and Equity, that I should not be permitted to use violence against him, who by violence hath dispof'd me of my Goods? Neither doth common charity (setting aside the Laws of God and men) hinder me by way of precept, unless it be for things of too small value, as deferve rather to be flighted, than with fuch eagerness to be prosecuted; which is an exception that some Writers do admit of.

Let us now see in what fome the Mafculine Law is to be understood, whereunto that old Law of Solon was parallel, which Demogogenes commemorates against Timoerates, from whence was taken the Law of the 12 Tables; and that of Ptolemy also in his Ninth de Legibus. All which Laws do agree in this, That they put a great difference between a Night, and a Day-Thief. But concerning the reason of this Law there is some question; Some are of opinion, that the only reason of this Law is, because by Night it cannot well be difcerned, whether he that breaks into an house, be a Thief or a Murderer; and therefore to prevent the worse, he may be killed as a Murderer. Others place the difference in this, That in the night a Thief cannot be known, and consequently the Goods from cannot be recovered, and therefore he may be killed. But in my opinion, the Lawmakers had no regard to either of thefe properly; but rather, that none ought to be kil-

The Day-Thief and the Night-Thief distinguished.

BOOK II. Of Defensive War.
led for stealing of Goods directly; yet, that in some cafes, the Goods stolen might occasion the death of him that stole them; namely, when the Goods stolen cannot otherwise be recovered, but by killing him who is flying away with them. But if any man in pursuing after my Goods, shall be brought into danger of my life, then it may be lawful for me to redeem mine own life out of danger, though with the hazard or loss of another man: Neither can it be justly objected against me, that I brought my self into that danger, because I proposed nothing to my self, but either to defend or recover what was mine own, or to take the Thief, which to me is lawful: nor do I injure any in the use of lawful means to a lawful end. But the difference between a Nocturnal and a Diurnal Thief consists in this, That in the Night there can hardly be found witnesses sufficient to testify the matter of Fact. Therefore in case a Thief be found slain, we deal generally credit to him, who shall confess that he flew him in his own defence; especially if the slain Thief be found with any offensive weapon by him. For this is by the Hebrew Law required, That the Nocturnal Thief was found digging through an hole, as some have translated the Hebrew word; or as others better, with a digging instrument about him; as the modern Learned of them have expansed that place of Jer. 2. 3. + I am the more easily guided to this Exposition by the Law of the Twelve Tables, whereby it is forbidden to kill a Thief that robs by day, with this exception, Unles he shall defend himself with some weapon. Now it is to be presumed, that a Thief that robs by Night, hath weapons about him to defend himself. By Weapons the Lawyer Caius understands, either iron, a Club or a Stone: on the contrary, it is the opinion of Olypius, That whereas it is provided by the Law, that he that kills a Thief by Night shall be indemnified, it ought not to be understood, in case, that in defending his Goods, he could not otherwise free himself from danger. There is therefore (as said) a strong presumption for him that kills a Nocturnal Thief: But if there were sufficient witnesses to prove, that he that killed such a Thief, was in so such danger, then the presumption would instantly cease, and he that should kill the said Thief, should be held guilty of Homicide. It is likewise provided by the Law of the Twelve Tables, That he that apprehends a Thief, whether by Day or Night, should publish it with an Out-cry ( as Caius instructs us:) that so, if it might be, both the Magistrate and the people may be called in to assist, and give testimony to the matter of Fact. But because such a Concourse cannot so easily be procured in the Night, as in the Day, therefore is more credit given unto him that shall affirm, that he killed the Nocturnal Thief in his own defence. Not unlike is that Hebrew Law in the cafe of Ravihment, which if committed in the Field, the person ravished was to have been believed; but not so, if in the City: Because there the both might and ought by her clamour, to have called in the Neighbours to her assistance. Not that the Cafe of Ra- vihment is always to be determined by this Rule, as Philo well expounds this place: For possible it is, that such a fact may be committed in a City without clamour, by dropping the mouth; and that in the Field, it may be done with Content (as in his Book of Special Laws he affirms). But that this Rule is to guide us in ordinary cafes of Ravihment, moreover admitting the dangers to be equal, yet in the Night, because we cannot so well defy what the dangers are, either for quality or quantity, therefore though the dangers may be left, yet the terror must needs be more. Let this also be observed, that both the Hebrew and Roman Laws, though they appear fierce, yet are they usually adulced by Charity. For they would not willingly punish Theft with death, there being so great a disproportion between Life and Goods, unless the Injured person in trying to recover his Goods, shall be brought in jeopardy of his Life. And Maimonides hath left this Character Rule for our Guide, while he gives no private man power to take away the life of another, unless it be in the defense of that, which being left, is irreparable; such as are Life and Chastity.

The Question is, Whether the Evangelical Law, being more Sublime and Spiritual, than either the Jewish or Roman Laws, do not require a more strict and perfect obedience, than those Laws do? And clearly it doth. For if our Blessed Saviour do enjoyn us to part with our Coat and our Cloaks, and if St. Paul admonish us to suffer our felves to be dispoiled of our Goods, rather than contend in Law for them, which is a kind of un- bloody frie: How much more doth that Law expect, that we should rather forbear and forego things though of a greater value, than embrow our hands in our Neighbours blood, he being Gods own Image, and of the same nature with our felves? Wherefore if our Goods, being stolen, may be recovered or defended without the danger of bloodshed, we do well so to do: But if not, we ought rather willingly to lose them, than to stain our hands with the blood of him that robs us: unless the things stolen, be such as are nece- sary for the sustentation of our felves or our families, and which cannot by any Courts of Juflice be recovered; because haply the Thief is not known, and that there is some fear, that without bloodshed, the thing will be gone. And although almost all both Divine and Lawyers, do at this day maintain, That to kill him that shall attempt to rob us of our Goods, is justifiable, yet is it not without danger. For that rule for Bulls and Cows, by which they are lead forth, is one: Whereupon the Calf is lead among the Oxen, &c.

III. How far forth Lawful by the Evangelical Law.

Of a Defensive War.
of our Goods is lawful, even beyond those limited bounds, wherein the Jewish and Roman Laws permitted it; as namely, in case the Thief being poftlef of our Goods doth, yet that this was the tenor of the Holy Scriptures in the Primitive Times. I cannot doubt. Neither did St. Augustin think otherwise, as may appear by these his own words. Quamvis aedem divinam providentiam a pecunia liberi sunt, quis pro his rebus, quas contemnere ipse, humanae codicis polluit font? How can they appear innocent before God? Trinitatis, who for things not worthy a Christian care, can pollute themselves with human blood? But doubtless in this, as in many other things of the like nature, Canes tempus earum officium: The ancient discipline of the Church is through age grown feeble; and by little and little, instead of fitting our lives to the strict Rules of the Gospel, we expound those Evangelical Precepts, in favour to the Corruptions of the Age we live in. This ancient discipline although almost forgotten among the Latins, yet was wont hereofore to be strictly observed by the Clergy; but now it is almost, if not altogether left aside by them also. Thus St. Jerome Complains in the Life of Malchus 2. After the Church of Christ began to be governed by Christian Princes, she grew outwardly indeed, more Splendid; but inwardly, left barren.

It is questioned by some, Whether the Law, at least the Civil Law, as it hath power of life and death, in such cases wherein it offers a private person to kill a Thief, doth or doth not legiminate the fact, as to make it altogether blameless? But this I cannot grant. For in the first place, The Law it hath not the power of death over all its subjects for every offence; but for such Crimes only as death deserveth. And very probably is the opinion of Senecas, That it is not lawful to adjudge any man to death, unless it be for such Crimes, as the Mediceal Law punished with death; with this addition only, or for such Crimes, as may be equally embattled with them. Neither doth the knowledge of the will of God, which alone can satisfie the mind, concerning this so great and weighty a matter, to plainly elsewhere appear, as it doth in that Law of Moses, whereby the Thief is not adjudged unto death. Besides, the Law neither ought, nor useth doth give unto any man a Right to put a Malefactor to death privately, though he deserveth it; unless it be for some great and horrible Crime. Otherwise the Authority of Magistrates and Courts of Judicature would soon dwindle to nothing. Wherefore when the Law licenciates a man to kill a Thief, it is to be understood, that it rather tolerates, than approves of the fact; and that it acquits him only of the punishment, but not that it gives him a Right to do it.

From what hath been already said, we may collect, that in two cases Single Combats may be undertaken by private men without sin. In the first place, if the Challenger shall grant his adversary a licence to fight, and otherwise threatens to kill him immediately in case he refuse. In the next place, when a King or a Magistrate shall give licence to two Malefactors equally deserving death, to try it out by Combat, whether of them shall live: And he that doth so, doth not so rightly perform his duty as he might: For it was much better, if he intended to satisfie himself with the death of one only, to determine, which of them shall dye by Lot.

What we have hitherto said concerning the Right we have to defend our Persons and Goods, belongs principally to private War, yet so, as it ought also to be applied to a publick, some respect being had to the difference that is between them. So faith Ammianus. To all that are invested by a Foreign Power, there is but one Law, and that perpetual, namely, by all possible means to defend their own safety; notwithstanding the force of any Causum. For as Alexander in Herodotus told his Souldiers, He that is the Aggressor, hath no colourable excuse for his injustice: But he that defends himself only, gathers Courage from a good Conference, and fortifies his hopes in this, that he doth not infer an injury, but repel one. Now in a private War, this Right of killing another, is but momentary, and determines as soon as the matter may be brought before a Judge. But in a publick War, which beginneth not, till Justice and judgement cease, there this Right lasts long, being fomented and perpetuated by such accidents, damages and wrongs, as are every day renewed in the prosecution of the War. Besides, in a private War, we have scarce any other end, than our own defence: But the Supreme Powers have a Right, not only to defend themselves, but to avenges on others; whence it is likewise lawful for them, not only to reftit certain and present dangers, but to prevent such as seem to threaten afar off. Not directly, for that (as I have already said) were injustice; but indirectly, by revenging such wrongs as are already begun, although not fully consummated; concerning which, we shall have cause to speak anon.

Neither can we approve of that which some Authors do affirm for truth; namely, That by the Law of Nations, it is a sufficient ground of a Just War, to suppress the over-swelling Power of some ambitious Prince, who if let alone, may exceedingly annoy us. That in our ordinary Councils of War, this usually comes in debate, I grant. But not so much under this Nation, because it is just, but as it is profitable: So that in case the War for
for other causes be just; for this cause it may prudentially be undertaken: And this is all that the Authors before cited do in effect say. But from a meer possibility, that we may hereafter suffer wrong, to conclude a present Right, or a necessity of doing wrong, will prove no good inference in a Court of Equity. For all humane affairs are obnoxious to so many contingencies, that no security can be expected in this life. Against all un-

constant and ignoble dangers, our safety conflits not in our Arms, but in our Innoxious prudence, co operating with the Divine Providence.

Nor lest unsatisfied am I with their Reasons, who affirm, That their Defence is just, who have given an occasion of a just War. Because, say they, There are very few that will be contented with such a measure of revenge, as is proportionable to the Injuries they have received. For this very fear of what is to come, being uncertain cannot

justify us, in the defence of Injuries already done. For, the malefactor may juflice his

refign of the publick Ministers of Justice, by his fear, that they will inflict a greater punishment upon him, than his Crime deserves. But he that gives just cause of offence, ought in the first place to render such satisfaction, as in the judgement of unbiassed

men, is equivalent to the wrong done; which if refined, then is his defence just. Thus did Hezekiah, who for breaking the League which his Ancestors had made with the Kings of Assyria, being threatened with War, confelt his fault, and promised to pay whatsoever the said King should impose upon him; which being done, when notwithstanding he was afterwards Invaded with a powerful Army, trufling to the Justice of his Cause, he made his defence, and had the Most High God for his Protector. Pontius Samnis after he had made restitution to the Romans of their Goods, and delivered up the Authors of the War, pleads thus with them, We have I hope appeased the just wrath of Heaven against us for our breach of the League, and am confident that the same Incensed Deities, who have constrained me to make full restitution of whatsoever we have formerly taken away from the Romans, will also plague the Romans for despoiling the expiation we offer, for the breach of so

INsolent a League. And by and by after, What more, O ye Romans, do I owe to you, or to your League, or to the Gods, that are the Impartial Arbiters of Leagues? To whom shall I appeal? Whom will ye accept of to judge of the Causes of your Anger, and of the measures of my sufferings? I refuse no people, no perfon. So when the Thebans had offered to the Laceda-

monians, all the satisfaction that in equity they could require, and were by them reject-

ted; Aristides told them, That the Justice of the War was thereby translated from the

Lacedaemonians to the Thebans. The like we read of the Swissers, who in revenge for a Load of Sheep-skins taken from a Merchant of theirs, by the Earl of Armon, having spoilt his Countrey, did afterwards ( being threatened by the Duke of Burgundy) offer to restore all they had taken from the said Earl, and to give what further satisfaction the said Duke should require: The refiial of which offer, cost the Duke his life, and the loss of almost all his Jewels and Treasure, as Comines testifies.
Of such things wherein Men have a Right in Common.

I. The division of that which we call Ours.
II. The Rise and Progress of Propriety.
III. That some things will not admit of Propriety, as the Sea, taken universally, or as to its principal parts, and why.
IV. Places not Inhabited are the first occupiers; unless in the generality it belong to some one people.
V. That Beasts, Birds, and Fish are the first occupiers, unless by some Law restrained.
VI. That there remains a Right in Common to the use of things properly our own, in times of necessity, and whence this arises.
VII. But not, in case that necessity be otherwise avoidable.
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IX. The things so used, to be restored as soon as we are able.
X. An Example of this Right in War.
XI. In things properly ours, there may be a Common Right, if those things bring profit unto others, without any detriment to our felues.
XII. Hence arises a Right in Common to a running Water, which if not used, is left.
XIII. That there is a Right to pass either by Land, or through Rivers. This explained.
XIV. Whether Taxes or Tolls may be imposed on Merchandizes carried from place to place.
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XVI. That there is a Right of habitation pertaining to such as are banished their own Country, submitting to the present Government.
XVII. A Right to inhabit distant places, how to be understood.
XVIII. A Right to such arts or things, without which men cannot conveniently live.
XIX. A Right to buy things necessary.
XX. But, to sell their Commodities.
XXI. A Right to contract Marriages: Explained.
XXII. A Right to do such things as are permitted to all strangers promiscuously.
XXIII. Which is to be understood, of such things as are permitted by the Law of Nature, but not of such things as are permitted out of Grace and Favours only.
XXIV. Whether it be lawful for one people to contract with another, that they shall not sell their Commodities to any other Nations, but themselves only.

I. The division of what we call Ours.

That War may be undertaken for Injuries not done, we have seen proved. Now it follows, that according to the order we proposed, we discover of the Second Branch of the canons justifying a War, namely, for Injuries actually done. And herein, first of Injuries done against that which is ours: Now of that which is ours, Some things are ours by a Right common with all Mankind, and some things are ours, in our own particular Right. We shall begin with that which is ours in common with others. This Common Right is either directly in some Corporeal thing, or to some Acts. Things Corporeal are either such as do admit of no propriety, or such as properly belong to some persons. Of things whereof there is as yet no propriety, some there are that cannot be improperly, and some there are that may. Now that this may be rightly understood, we must search into the rise or beginning of propriety, which Lawyers call Dominion.

Almighty God, as soon as he had created the World, did immediately confer a Right generally to all mankind in things of this Inferior Nature. And so again when he had renewed the world after the Flood, as may be seen Gen. 1:28, 30. and Gen. 9:2. All things at first (faith Jesum, were promissory common and undivided to all, and as it were one entire Patrimonium benefitted into all. Whence it came to pass, that every man did catch whatsoever he would to his own use, and consume what could be consumed. And the free exercise of this Universal Right was then instead of Propriety: For whatsoever any man did thus catch unto himself, no man could take from him without injury. This may be very fitly illustrated by that Simile which we find in Cicero concerning a Theatre, which we know is a public place, and common to all that come; yet may that particular place which I possess be rightly called mine. There are Seats that are common to all Roman Knights, but that amongst them is mine own, faith Seneca, which I actually possess. Which state of things might very well have lasted, had men either perilled in the same inoffensive simplicity, or could they have embraced each other with the same mutual endearments of charity. An experiment
ment of the former we have in some people of America, who have continued in that
of the Conclusion for many ages, with admirable simplicity: And for those that lived
in the like Conclusion, through Charity, we have the like precedents in the
and in the Primitive Christians at Jerusalem, and their followers, the
and now also in not a few, who lead lives purely Monastical. The nakedness wherein our first
Parents were created, did sufficiently evidence their simplicity, which consisted rather
in their Ignorance of Vice, than in their knowledge of Virtue: As Tygres testifies of the
Scythian. The men of the first age (faith Tactius) were free from inordinate affection,
wrongs, clear from any thing that might occasion reproaches; and consequently
without restraint or punishment. Thus Seneca also testifies of them, They were, faith he,
ignorantly innocent: And afterwards, speaking of the four Cardinal virtues, he adds,
Some resemblances of these, there were in that plain and simple life they led: As having their
minds directed with no manner of Care: As Jujphus testifies. And to the same purpose
writes Macrobius, At the first the Conversation of men was with such an Innocent Simplicity,
as had no commixture at all of evil in it, being altogether unacquainted with that guile and
futility that now reigneth in the World. The Wise man terms it Sincerity; and doth
St. Paul, Eph. 6. 24. and sometimes it is called singeleness, which is opposed to craft and
futility. They then made the worship of God their only care, which was symbolized by the
Tree of Life or Divine Wildem, Prov. 3. 18. As Philo, and the learned among
the Jews explain it; with whom agrees St. John, Apoc. 22. 2. Their diet was as simple
as their lives; for they fed on nothing but what Nature liberally afforded them, without
our Cultivation. But in this Innocent Simplicity they continued not long, but wandering
in devious paths, and making every new experiments, they became by degrees
acquainted with Sin, which stands Embem'd out in Scripture by the Tree of
Knowledge of Good and Evil, that is, of those things which they had power to use well
or ill: which Philo calls σύνεκροι πάντα, an Intermediate Prudence; or a Prudence which
is conversant about things in themselves indifferent. Whereunto Solomon had respect,
when he tells us, That God made man upright, that is, Simple, but he hath found out many
Inventions: Which Philo expounds, Many fattle Devices; Which, as Dion Porsscanus ob-
erves, were no whit to those that succeeded to our first Parents, advantageous as to Life; For
they made use of their Sagacity so much to fortify themselves with Justice and Temperance,
as to corrupt themselves by voluptuousness. Those most ancient Arts, as the Tilling of the
Earth, and the depauperation of Cattle were first exercised by the first brethren, not with
some kind of distribution of the Fruits. This diversity of Arts begat a kind of Emulation,
and this ended in Murther. And afterwards, when by Conversation the bad infected
the good, there grew up a Race of men, who for their violence and oppression, were
called Gyants; which the Greeks called Χιλλόχις, because they observed no other rule
of Justice but their own strength, and therefore thought all to be their own, which
they could conquer. But the World being cleansed from blood and rapine by the Deluge;
Left, inflamed with Wine, succeeded to Cruelty, and brought forth Incest, and such like
unnatural Coitions. But that which especially blew the Coals of discord among Princes
and Nations, was that Heroick Sin of Ambition, whole Emblem was the Tower of
Babylon; whence the division of Tongues caused their dispersion into several Countries;
some possessing one part of the Earth, and some another. But yet still among Neigh-
bours there remained a Communion not of Cattle, but of Palfurage; for so large a propor-
tion of ground (being but thinly peopled) might without any Inconvenience, suffi-
ciently supply all their necessaries.

To mark their own, and trench out others Land
Was not yet Lawful.

Until at length, the numbers both of Men and Cattle encreasing, the Land also became
sub-divided, not into Nations and Provinces as before, but into single Families. And
whereas in dry and sandy regions, Springs though very necessary, yet were not able to
supply a multitude: Therefore did every man strive by taking the first possession of them
to make them his own. All these things we may trace out of the Sacred Story, whereunto we might add the concurrent Testimonies both of Philosophers and Poets, who have treated of the first State of things held in common, and of the subtilest distribution of them, but that I have done it elsewhere. From hence we learn the true cause why men
departed from that Primitive Community of things, first of movables, and afterwards of immo-
vables: Namely, because repining to be at Nature's bare allowance, that is, to feed on Roots
and Herbs, to make their habitations in Caves, to go naked, or clad with skins of Trees, or
Skins of Beasts (as the Senefink described by Procopius did) they made choice of a more
delicate kind of living, which would require industry, which every particular man was in
every thing to use for himself. Now that the Fruits of the Earth could not be conven-
ently
ently laid up or disposed of in common, will easily be granted; First, by reason of the vast distance of the places inhabited, the one from the other. And Secondly, because of the great defect of Love and Charity among men: By reason whereof, no due equality could be observed, either of Labour in their Acquisition, or of Temperance in their Consumpt. And from hence we may further learn, for what causes things were reduced into Propriety: Not by the sole act of the Mind; for no one man could possibly know what another would have to be his own, that he might forbear it. Besides, possible it is, that diverse men might be competitors for one and the same thing. But things became proper by compact or agreement, and that either express, or by partition; or tacit, as by present occupancy: But as soon as experience had taught them the inconveniences of holding things in common, and yet before Division was first instituted, it is very probable, that they unanimously agreed, That what every man possesst at that time should be his own. Thus Cicero, To the end that of what nature had made common., each man might call something his, it was agreed, That look what every man had in possess.ion, he might hold as his own. And in another place, It is generally granted, faith he, neither doth nature her self enjoy it, That as to things opportunistic to life, Quique sibi malit quam alii acquiri; Every man had rather enjoy them himself, than that another should have them. Whereunto we may add that of Quintilian, If this be the state and condition of things, That whatsoever is useful to Men, belongs properly to him that possesseth it; then surely whatever is justly ours, cannot justly be taken from us. Which very thing Cicero illustrates by a Similitude borrowed from Chryseis of a race, Ubii circulari orta adversarium vincere, non detendendo; Wherein a man might overcome his adversary by running, but not by detraction. This was wife Solon's will,

Riches I fear would have, but if I got
(Let them be we're so great) I wish them not.

And when the Ancients stiled Ceres the Law giver, and called her holy Myluries Theomphoria, they doubtlesly intimatst that the division of the Earth into Corn-fields, was as it were, the Creation of a new Right. For as an house or field unoccupied is common, but if possesst, the possessor. So the Earth is divided into several parcels, that each man may till, and hold his own.

Now these things being admitted, we say, That the Sea, considerst either Universally, or as to its principal parts, cannot be held in propriety by any: This, because granted by some, as to private persons only, but not unto people or nations, I shall endeavour to prove, first, by moral reason. For the cause that moved men to decline their tenure of Lands in common, doth not at all hold in the Sea, which being so vast and boundlesse, and Ships and Men thereon employed, so few, must needs be abundantly sufficient to all nations, and for all uses; whether for Water, Fishing, or Navigation. The very same may be said of the air, if any such use could be made thereof, whereunto the use of the Earth under it were not necessary; as in the sport of Hawking, and in the Right of Habitation; both which do receive Laws from him who is the Lord of the Soyl; For as Pompianos observeth, Tam Soli quam Cali mentorum facienda est; And again Cato, Cujus est Solum ejus est utique ad Ceulum; Whose is the Soyl, his is all that is above it, even unto Heaven. The very same may be said of Snelves and Quick-finds, where nothing can be made to grow, and whereof there can be made no other use, but to ballast Ships, and whereof there is such store, that it cannot possibly be exhausted. There is also a Natural reason, why the Sea so taken, cannot be held in propriety: because Occupatio non procedit nisi in re terminata; Nothing can be said to be possesst, that is not bounded. Hence it is that Thyseides calls Land unoccupied, Lands unbounded: And Socratic, of some Land occupied by the Athenians, faith, That that Land is by us bounded and limited. Now Aristotle tells us, That Liquid things cannot be contained within their own bounds. And if so, then they cannot be possesst, unless they be contained in some what that is solid and comprehensive of them; as Ponds, Lakes, and Rivers are theirs proprely whole the Land is, wherewith they are embanked. Now the Sea cannot properly be said to be contained in the earth, being equal to it, Nay greater than the Earth, as Ioueis in Philostratus thought of the Ocean; And therefore the Ancients held that the Sea did contain the Earth. What (faith Cellius) can be said to be about the Ocean, when the Ocean itself is circumscribed, and compasseth the Earth? And a little after, Since that every where, and in all manner of ways it flows about the Earth, nothing can be said to be about it: But all regions being entrenched and environed with its Waves, whatsoever is enclosed within the brink of the Ocean, are in the midst of it. So likewise speaks Livy of the Ocean, Qui orbe terrarum amplissimis suis; Which environes with its Waves the terrestrial globe. Sestus calls the Ocean, Vinculum totius orbis, eaudediqui terrarum; The bond or ligament of the earth, and the Sguard of the Nations. Neither is a division of that vast body of Waters
Chap. ii. Defarts, Birds, Wild Beasts, Fish, whose they are.

I. Defarts.

I. i. This may be imagined: For when at the first, Lands were divided, the Sea, at least, the greatest part thereof, was unknown; and therefore no means can possibly be invented whereby the nations so far distant should agree about the division of that which they know not: wherefore it is probable, that what then was the Common Right of all, and in the first division was left undivided, is not now the proper Right of any, either people or persons by division, but by occupancy, neither can be divided until they have first been occupied.

Let us now defend unto such things wherein we may have a Right of Propriety, though as yet we have none: Such are many places which are as yet desert, and unoccupied: Islands in the Sea, Wild Beasts, Birds, and Fish. Concerning which, two things are observable: First, concerning places unpeopled: There is a two-fold Right of the occupancy of Lands, the one Universal, or of the whole; the other Partial, as that of Mens and Farms. The former is usually gained at the charge, and for the benefit of the Common-wealth, or of him who hath the Sovereignty over the people: The other by private Lords or Farmers, which is done, rather by alienation from the former, than by any free and unlimited occupancy. But in case there be any part or parcel of that Countrey or Island, (so universally occupied) that is not yet alligned to particular persons, it is not therefore to be reputed as wafe, but it is still supposed to be in the possession of the first occupants, be they King or People. Such are usually Rivers, Lakes, Ponds, Woods, steep Mountains, and the like.

Secondly, As to Wild Beasts, Birds and Fish, this is to be observed, That he that hath the dominion over the Lands and Waters, may by his Laws interdict others from taking them; or being taken, from carrying them away: And by this Law shall strangers also be obliged. The reason whereof is, That to the Government of the people it is morally necessary, That whoever shall sojourn among the people, though but for a while, yet as soon as he shall enter into their dominions, he shall render himself Conformable to the Laws and Customs of that people. Neither doth it avail to the contrary, to say, That in the Roman Law we often read, that by the Laws of Nature and Nations, it is free for any man to hunt such kind of creatures: For this might be, whileth there was no Civil Law to prohibit it, as indeed there were many other things that were left free and arbitrary, by the Roman Laws in the Infancy of their Common-wealth, which the Laws of other Nations did severely restrain. But when the Civil Law shall otherwise decree it, then the very Law of Nature doth require that we should observe it. For although the Civil Law can enjoy nothing that the Law of Nature forbids, nor forbid any thing that it commands; yet notwithstanding it may limit and circumscribe that which the Law of Nature leaves free, and forbid that which naturally may be lawful. And so the Civil Law may by interposing her authority, prevent that dominion which naturally might be acquired.

Let us now examine, Whether in what is properly ours, there may yet remain a Right in Common to others. Which question may by some be thought strange, considering that Property seems to swallow up all Right, which was at first held in Common. But it is not so; for our better understanding whereof, we must look back to the true meaning of those who first introduced particular dominion: which may be presumed to be such as did (as little as might be) recede from natural equity. For if even our written Laws oblige us but to a Quantum fieri potest; To what in natural equity may be done (as appears by our frequent Appeals from our Statute, and Common Laws, unto our Courts of Chancery:) much more may our Customes admit of such an exposition, which are not fitted to Words and Syllables. Hence then it follows, that in cases of extreme necessity that ancient Right of using every particular mans goods, as if they remained yet in Common, stands in force: For as in all humane Laws, so in this very Law of Dominions, cases of absolute necessity are generally excepted. Hence it is, that in Navigation, if the Common folk of Vulcans be spent, what every particular man hath is held as Common. So in the case of Fire, if I cannot otherwise avoid it, I may pull down my neighbours house to preserve mine own: And on the Seas, If my Ship fall foul, or be intangled with another, I may cut their Cables to free my self. All which are not introduced, but expounded by the Civil Law: But this (as Ulpian tells us) never holds, unleas it be in cases of extreme and manifest necessity, where this case is added of the blowing up of another mans house to save mine own. For even among Divines, it is a received opinion, That in a time of absolute necessity, if a man shall take away from another that without which he that takes it cannot live, he doth not commit Theft: Not, as some think, because it is to be presumed, that the right owner by the rule of Charity, is bound to give it to him that so wants it; but, that it may be presumed, that the reducing of things originally Common into private dominion, was to be understood with some grains of allowance in such Cases. For if they that first divided such things, had been demand-
of this mind. *Necesary (faith Seneca the Father) being a most benign Patroness to humane fraternity, will not be binded up by any Law, i.e. humane, or that is made after the manner of humane Laws. Quaeque coegit, defendat, &c. Whivesever it commands, it also defends, faith the same Seneca. In a Storm it dishonests the Ship with the loss of the Goods, in a Fire it quenches the flame with the ruin of the Fabrick: Necessity is indeed the Law of time. Thus Cicero, Cal-lius (faith he) passed over into Syria, another means Province: If men might freely enjoy the benefit of our written Laws, but these being by Arms suppreft into his own Province by the Law of Nature. So Curtius, In a common calamity every man must bear his portion, and be content with the fortune that befalls him.

But some Cautions ought to be admitted, left this License stray too far, the first whereof is this, That all ways and means are in the first place to be tried, whether this necessity be otherwise avoided, so that it may appear unto all men that this necessity is extreme: As we should first make our application to the Magistrate, and try whether he will relieve us; then to the owner of the Goods, whether we may by entreaty obtain that which we fland in need of. Plato would not permit any man to require water from anthers well, that had not dug for water in his own grounds, usque ad caementum, even till he be come to chalk, but could find none. Selon required that he should dig forty Cubits in his own Lands, whereunto Plutarch adds, Subvenendum necessitati, non infra trivium pigritiain; It is fit that men necessities should be relieved, but not that idlenes should be encouraged. And it was Xenophon's plea to the Simpofets, Wherefore we are denied the common right of buying necessities, there, whether from Grecians or Barbarians, we will take them by force, yet not out of poverenefs but necessity.

2. This is not to be allowed, if the right owner be preft by the like necessity, for when the cafe it equal, Poffidentis minor est condition, * The condition of the present Occupant is to be preferred. A wife man will rather die (faith Laclunus) than be inftant: He will not defpife the Shipurprize of the plant he befides, though he might thereby lose his own life; nor undertake his wounded Comrade, although by betraying his life, he might save his own. Will not then a wise man (faith Cicero) being famished with hunger, take away meat from him whom he knows to be good for nothing? No surely, for life it self is not dearer unto me, than this resolution of mine, Neminem ut viorem commode me gratia, Not to injure another to benefit my self. So Curtius, Millor est caufa fium non tradentis, quam licentiam poecentis: For better is his condition that gives what is his own, than his that requires that which is another man's.

Thirdly, When the danger incumbent is past, refituation is to be made, if we are able: Some there are that think otherwise, being swayed by this argument, because he that ufeth his own right only, is not oblig'd to refituation. But to speak truly, this right is not his own fully and absolutely, but restrained and clog'd with the duty of refituation, when that necessity shall cease; for such a limited right suffficient to preferve natural equry, against the rigour of absolute dominion.

Hence we may collect, By what Right he that wageth a Just War, may lawfully purpofe and hold some strange place in a Country that is at peace with him, being but weakly guarded; that is to say, if there be no imaginary but a certain danger that his enemy may pelts himself of it, and thereby do him an irreparable damage, especially if nothing be taken but what is necery for his own Security: As namely, the bare custody of the place, learing the jurifduction and profits thereof unto the right owner. And lastly, If it be done with a full purpofe to restore even the custody of the place alfo, as soon as the necessity of keeping it for by his own indemnity shall cease. Ema, faith Livy, was detained either by feared or out of pure necessity: For whatsoever here doth in the smallest degree de-

cline from necery, is injury. The Graecians that flood in great danger for want of Ships, by the advice of Xenophon, feized fuch as paffed by, yet fo, that the Goods were preferred entirely for the Owners, and the Seamen well fed and paid. The Fire Right therefore, that fine propriety was introduced, pleads for exemption, is this of Neceryl.

The next is, That of Innocent profit. What should hinder us (faith Cicero, from comunicating with others, when we may do it without any detriment to our felves, especialy in thinges that are profitable to those that receive them, and not damagable to us that give them? Seneca will not admit of this to be a courtezie, to kindle a Coal at our Fire, or to light a Torch or a Candle by ours: Plutarch accounts it an all of impiety, to ceafl away what we cannot eat, to feed a Peafant when we have drank our felves full, to remove Land or Sea-marke which have been infelusius us: For, faith he, in these things after that we have fatisfi'd our felves, every man hath a common Right.

So a River, as it is a River, is the propriety of thofe people whole the Banks are, or his, who hath the Sovereign Power over them, in whole power it is to make Dams or Mills in it, and whatfoever is bred in that River is his: But that River as it is a flowing Stream remains common, every man hath a Right to drink or to draw water out of it, as well as he that owns it. Quo
Quid vetat opprisito lumen de lumine sumi?
Aque cavum vastas in mare servet aquas?

Who at his Torch, light to a Torch denies?
And wh'would engulf the Seas vast Cavities?

faith Ovid, who also brings in Latins thus be speaking the Lycians:

Quid prohibetis Aquas? nisus communis aequum.

Why water d'ye deny?
Whose use should common lye.

Where also he reckons water among those publick Gifts that Nature beplows upon all men alike, the word Publick being improperly taken, in which fence some things are laid to be publick by the Law of Nations: Virgil tells us the water is open to common and all, as well Strangers as Natives.

Thus both Lands, Rivers, and such parts of the Sea as are held by any Prince or People in propriety, ought to lye open and free to all such as have occasion to pass over them upon any just and lawful cause, as namely, either because being expelled their own, they seek after some other Country that lyes waife, or because they desire to traffick with some people remote from them; or even because they seek to recover what is their own by a just war. The reason is the same here as above, becaufc it is very probable, that dominion was introduced at the first with this limitation, that such things should remain in common use, which might be profitable to some and not hurtful to others: And therefore the first Authors of Propriety are conceived to have thus agreed it. A signal example whereof we have in the History of Moses, Numb. 20. 21. who being to march through the borders of the Emorites and Amorites, offers their Conditions, That he would travel only through their high-ways, without trespassing upon any private mans possessions; if he had need of anything that was theirs, he would pay the just price of it. Which being rejected, was ground sufficient for that War which he made against the Amorites: Whence St. Augustine thus, An innocent passage was denied them, which ought by the Laws of humanity to lye open and free to all who require it. Whereupon St. Augustine concludes, That the war made by the Israelites against the Amorites, was just. Hercules flew Amyntor King of the Orthomaniens, because he denied him a free passage: So did the Graecians make War against Jephthah, because he refused to give them leave to pass through the borders of his Country. Thus also do the Graecians, which were under Clesarchus, plead; We (say they) are travelling towards our own Country, peaceably, if none molest us; but if any shall hinder us, we will endeavour by the assistance of the Gods to force our way. So likewise Agesthas returning out of Asia, when he came to Troas, demanded, An ut Amicum in ut hostem tranire mutarent? Whether they directed that he should pass through their Country as a Friend or as an Enemy? The like demand was made by Lyaxder to the Bactrian, Retin sa haffit se tranire velit, an inclination? Whether they would have him to pass in a peaceful or in a warlike posture? Thus do the Bactrians remonstrance to the Bactrian, that he not be first acquainted the City with his purpose, (for they that knock at other mens doors (say they) enter not but by permission) returns this answer, But ye (faith he) have not knockt at the doors of the Crecians and of the Megarenses, but have broken them open: Cesentes omnia potere deberes plurimis, Concerning that all places ought to lye open to the strangers. But the most moderate opinion is the best: Leave is first to be demanded, according to that of Aristophanes,

Whilk toward Delphos we our Army lead,
First from Bactrians we free passage crav'd.

But if it be denied, then may our passage be justly forced by Arms: When the Germans and the French made war one against the other for Marano, the Venetians gave free passage to them both, whereas when the Germans complained, they were answered that they could not hinder it but by Arms, which it was not their custom to use, but against their publick Enemies. Agesthas in Plutarch returning out of Asia, and demanding free passage for his Army through Macedo, was answered by the King that he would confute about it; Whereunto Agesthas replied, Confutet vos interes usarmos, Let him confute; and we in the mean time will enter. Neither may it be justly objected, that the multitude of those that are
Free Passage by Land or Sea.

BOOK II.

Remedies against this fear.

As to pass, may give just cause of fear; for *Just mean mean two non telluris. My Right is not taken away by thy fear: And the rather, because there are certain Remedies provided against this fear; as that they shall march in small parties, that they shall march unarmed, or that they shall give security to repair all damages that shall be done, which was required from *Iuccius for his passage through Germany; (which custom, as *Saroba notes, was anciently observed in the Country of the *Eleusis) or that he through whole Country the Army is to pass, may at the charge of him that demands leave, hire sufficient Forces to guard his own Subjects, or that Hostages may be given, which *Selecus required of *Demetrius, to suffer him to play a while within the borders of his Empire. Many notable Caution and Remedies we may read of in *Nicetas, made and agreed on by *Frederick Barbarossa, and *Iuccius Angelus, concerning the free passage of an Army: Yet Cesar we read deny ed the *Swirizzer passage through his Province, because he believed them to be a people so rapacious that they could not abstain from acts of violence. So likewise neither is the fear of him, against whom he that craves passage makes a just War, any sufficient reason to deny passage: Nor is it sufficient to say he may pass some other way, for so may any other lay, and consequently by that means all right of passage shall be taken away. But it is enough that without any fraud or ill meaning, passage is demanded the nearest or most convenient way; yet certainly if he that craves passage do make an unjust war, or shall lead with him such as are mine enemies, I may deny them; for it is lawful for me to meet him even in his own Territories, to intercept his passage into mine: Neither is there only a Right in common due for persons to pass to and fro about their lawful affairs, but for their merchandises; for to hinder any one Nation from maintaining commerce and traffic with another that is remote from them, is unjust. For that this freedom may be admitted and maintained, is for the common interest of humane society, neither can it bring damage unto any: For although a man do sometimes fall short of that gain, which was not due, but hoped for only, we ought not to register this among the number of our looses. To these Terrors which we have already produced to this purpose, we shall add this one out of *Philo, *Merchants Ships do fall over the Seas without danger, with such Goods as Nations, out of a desire to partake of each others Commodities, do carry for exchange, whilst they mutually relieve the wants of the one, with the superfluities of the other. And another out of *Plutarch, who concerning the Sea, speaks thus, Our life, which is otherwise wild and unfruit for commerce, this Element perfects and makes sociable, supplying whatsoever is wanting in one Nation, out of the stores of the other; and by the exchange of Merchandises, contriving a friendly confusion. Wherewith accords that of *Elianuss, God, faith he, Hath not made any one part of the World, the Storehouse of all his blessings, but hath wisely distributed them through all Nations, so each needeth another help, he might thereby lead men to Society: And to this end he discovered unto them the Art of Merchandising, that so whatsoever any Nation produced, might be communicated unto others. And therefore *Euripides reckons Navigation amongst those things, which humane reason had found out for a publick good: So *Thesius speaks very pertinently,

What, to one Nation, Nature doth deny, That, she from others, doth by Sea supply.

XIV. Whether Tolls may be imposed on Merchandises.

But a Question will arise, whether upon such Merchandises as are thus transported either on Land, or in a River, or in some small parts of the Sea, which may be called *Accettes to Land, Tolls may be imposed by him who hath the Soveraign Power in that Land: And doubtless if such Impositions have no respect to the Goods, there can be no colour of equity to impose them on the Goods: As if a Tax be laid by the Pole upon Subjects, to defray the charges of the Common-wealth; it cannot be required of Merchants, who pass as Strangers. But if either for the better securing of their Merchandises, or if for this among other things, the Prince shall be at any great charge, then to recompense that charge, Tolls may be imposed upon those goods that shall be thus secured, so that they be not excessive; for hereupon depends the Justice of Taxes and Tributes. Thus we read that King Solomon received Tolls for Horses and Linen Thread, passing by the Syrian *Sheltus: So *Pisin of Frankincense, that it could not be transported by any but the *Calabians; therefore there was a Toll paid unto the King for them: So the people of *Masellis being exceedingly enriched by a Channel or *Trench, which *Marinus caused to be made out of the *Rhine into the Sea, imposed a Toll for all Ships importing or exporting any kind of Merchandises, as *Siroca notes. And in another place he tells us, that the *Corinthians did by a very ancient custom, require Tolls for all such Goods as were carried over Land from Sea to Sea, to avoid that dangerous passage of Medes. The like did the *Romans receive for passing the *Rhine. Thus did the King of Denmark exact a quarter of an ounce of Gold, for every Ship passing the Sound, and as much for the Lading, with some other smaller Sums to maintain Fires, and Barrels to guide Merchants, that they might avoid Rocks and Shelves,
of Mr. Camden relates. Nay for passing over Bridges is Toll in some places paid, faith Secene. Tea and for passing over Rivers, as all our Law Books testify. But these Tolls are sometimes very excessive, whereas Strabo complains thus, Difficile est ut inter validos & feraces deminuer modus mercatoris non gravis; It is very hard to find amongst fierce and warlike Nations, such Impositions as are not to the Merchants grievances.

There is likewise a common Right for all that travel as well by Sea as by Land, to stay and rest for a while, in any Foreign parts, either for health or for any other just cause. This being comprehended among things innocently profitable, and therefore Isauens in Virgin being forbidden to stay on the Africans Shore, presumed to invoke the Gods as Judges, and the complaint of the Magnaezens against the Athenians for denying them admittance into their Ports, was allowed by the Gracians to have been just, as being against common Right, as Plutarch notes. The Shore is his that occupies it, and therefore they must needs be cruel who deny us things that are common. Hercules flew Laomedon for denying him the benefit of his Port: And the Lacedamoniens thought no cause of War could be more just, than to be denied the benefit of the Shore. And consequently it is likewise lawful to erect a little Flight Cottage on the Shore for present shelter, notwithstanding that, we do grant that shore to be possessed by the people that are Natives; For whereas Pomponius requires an Order from the People or Praetor, to licent any man to erect any thing upon the common shore or in the Sea, it is to be understood of such Edifices, as are lasting and permanent; whereunto tends that of the Poet,

Contrala pises aqua fententis, 
Fallis in alium molibus.

— Whilst Hills in Seas are café, 
Fith frightened from their Halls, do stand again.

Neither may we justly deny such Strangers as are driven from their own Seats, a right of perpetual cohabitation, whilst they shall submit to the Government established, and to other things necessary to avoid Sedition, which was very well observed by the Poet, where he brings in Aenas tending these reasonable Conditions,

Soter arma Latinus habet, 
Imperium solenne socr.

And Latinus himself in Haliaeas adjudged Aenas his caufe to be just, if being destitute of any other place of habitation, he were informed thither. Barbarum efl hospites pelter; To drive those from us who come like Friends to visit us, or to dwell amongst us is barbarous. Neither are the Spartans herein to be approved of: So St. Ambrofe, Their advice is not to be followed who would not have Strangers to live among them. Thus did the Gracians receive the Colophonsians, the Rhodians Poburantes with his Associates, the Lacedamoniens the Spartans, as the Comans did others that came to cohabit with them. But when the same Spartans, being so received, demanded to share with the Lacedamoniens in their Government, He- rodotus justly condemns them as ungrateful, for pretending to that whereunto they could have no Right; whereby (as Valerius Maximus observes) that was turned into an injury, which was intended as a Courtege.

And if there be within the Territories of any Prince or People, any Land that is defart and incultivated, that also is to be granted unto Strangers if they requite it, or they may lawfully possess it, because that which is not cultivated is reputed as desert, unless it be in respect of the Soveraignty, which remains notwithstanding the people or Prince within whose Territories it lies. Servius notes, that seven hundred Furlongs of Land being barren and hard, was by the old Latines granted to the Trojans: And we read in Dio- nysius Prsefanis, that Nibik passant qui partem terrae incultam colunt, They do no wrong that are willing to inhabit places desert and unoccupied. The Aufibaris of old (in Tacitus) cry out against the Romans, for denying them some grounds that (as they conceived) lay waste. Thus, As the Gods have reserved Heaven to themselves, so have they given the Earth to Mankind, every part whereof that lies unoccupied, is common. And then looking up to the Sun, and the Stars, he thus demands of them, Witlers ne inueri inane solam? Whether they were willing to behold the Earth to lye desolate, and not rather that the Sea should overflow it, than to suffer such defrey-
The Right to traffic; to buy Necessaries; to Marry. BOOK II.

ers of the Earth to engage in, and to make no use of it? But these general sayings, though true, yet were ill applied to the matter then in question: For those Lands did not at all yeo wallke, but served for the depaupuring of all manner of Cattle belonging to the Southerners, and might therefore justly be denied them. No lefs just was that Query which the ancient Romans made to the Gallifmones, By what Right they exclad Land from the Right owners, and in case of refual threatened War?

After the Right that is Common to things, follows that which is Common to some acts: And this Right is granted either singly, or upon supposition. Simply, This Right in Common is granted to such Acts, whereby those things may be acquired, without which we cannot conveniently habite. I mean not here, such a necelssity as justifies us in the tak-king away of another mans goods: For we difcourage not here, of things taken away against the will of the right owner, but of the means how to obtain things convenient, with the consent of the owner; at leaft, that no impediment be given either by a publick Law, or any private Conspiracie: For in such things whereof we have spoked, such an impediment is repugnant to humane Society. Thus Plutarch concerning the Megarenses, They bitterly complained, that contrary to the Law of Nations, they were denied trafficke, and driven from all Ports which were held by the Athenians. What every Country abounds with, faith Seneca, is made known to all Nations, that all men might see the necessity there was of maintaining commerce among themselves, in case any Nation did want what another Nation had. And again, Whatever any people hath, that dur Commerce give to all, and those Countries that are difficult and distant from each other, Traffike mates and joins together. I speak not here, as to things luflerious or voluptuous, but of such only as conduite to the preervation of our Lives, as Aliment, Vellments, Medicaments, and the like.

To procure those things at an equal rate, every man (we fay) hath a Common Right, unless they from whom such things are required, do themselves stand in need of them. If in the time of a Common dearth we infinitely forbid the transportation of Corn; For, that the Natives fhould fea be fed with the fruits of their own Land is but reasonable. And yet in some necelssities a time, the strangers whom we have once admitted, we cannot expel. For, Commune Malum committere tolerandum; Common Calamities must be born in Common.

But to fell their Commodities, it is not fit to allow every man the fame Right; For every man is free to prescribe what he will buy, and what he will not. So the Belgians of old would not admit of Wine, and other exotic Commodities, to be fold amongst them. The like Strafedities of the Arabians, amongst whom some things might be imported, and others not.

By this right it is Lawfull for the people of one Nation to contract Matrimony with the people of another; especially, if being driven out of their own Country, they shall come to inhabit another. For though some men may live without the use of Women, yet others cannot. They are men of excellent temperers that can content them-selves to lead single lives: And therefore to abridge them of the liberty of Marriage is an Injury offered to humane Nature. Romulus, in Livy, makes it his requit to his Neigh-bours, That they would not disdaine by Interchangeable Marriages to mix generations with them. And Camillus in the fame Author pleads thus, We, faith he, require but lawful Wedlks, which to Neighbours Nations and Foreigners is usually granted. What is unjustly denyed, may by the Right of War be justly taken, faith Aug. Now whereas the Civil Laws of some people do carefully provide against such Marriages; they seem to be grounded upon this reason, Because in the times when thole Laws were made, there was hardly any Nation or People but were sufficiently flored with Women, or that thole Laws were not intended to interdict all such Marriages, but such only as were Legitimate or Juft; that is, which should produce some special effects of a Civil Right.

Among such acts wherunto a Right in Common is given by supposition, we are to reckon thole which a Prince or People do promiscuously permit to all strangers, for that Nation is injured which is excluded. Thus if it be permitted in any place for Strangers to Hunt, Fish, Hawk, gather Pearls; If it be allowed them to receive Legacies, to fell Commodities, if (even where there is no scarcity of Women) to contract Marriages, these cannot be denied to any one people, unless they have some ways abuited their Liberty; for which cause it was, that the rest of the Hebrews denied to inter-marry with the Ben-jaminites.

But this is to be understood of such Acts only, as are permitted, as it were, by ver-true of that liberty which nature gives, being restrained or taken away by no Law: but not of such as are indulged to any Nation as acts of Grace, dispensing with the Laws; For to deny a Courtelle is no Injury.
Another Question is frequently started, which is this, Whether it be lawful for one Nation to contract with another for all their Fruits of such a kind, which are no where else to be found, so that they shall sell none to any other Nation. This in mine opinion may be lawful: If that people that shall so buy them, be willing to communicate to others at a reasonable price. For it concerns not other Nations much by whom they are supplied with their Natural wants, so as they are supplied. And it is lawful for any to anticipate others in matters of profit, especially if there be any special cause for it; as in case the people making this Contract, shall undertake the protection of the other people, and shall for that cause be at some expense or charge. For such an Ingrossing made with such an Intent, as I have said, is no way repugnant to the Natural Right; although it be sometimes prohibited by the Civil Law, for the benefit of the Common-wealth.
Of the Original Acquisition of things; where also of the Sea, and of Rivers.

I. That things were originally acquired, either by division or occupancy.
II. Other ways refuted as the concession of Rights Incorporated.
III. As that of Specification.
IV. Occupancy two-fold, either of Empire, or of Dominion: This explained.
V. That the Right of Occupancy, as to things moveable, may by Law be prevented.
VI. The Dominion of Infants and Mad-men, by what Right held.
VII. That Rivers may be acquired by Occupancy.
VIII. Whether the Sea also may be so.
IX. Adsciently in some parts of the Roman Empire, that was not lawful.
X. But as to such parts of the Sea, as are Included by Land on each side, the Law of Nature doth not Impugn it.
XI. How such a Right of Occupancy may be made, and how long it lasts.
XII. That such an Occupancy gives no Right to Impede an Innocent passage of Ships upon them.
XIII. That Empire over some part of the Sea may be gained by Occupancy, and how.
XIV. That Toll for certain caufes may be Imposed on such as trafficke by Sea.
XV. Of Agreements which forbid some people to sail beyond certain bounds.
XVI. A River changing its course, whether it change the bounds of the territory; explained by a distinction.
XVII. What is to be determined in case a River do manifestly change its course.
XVIII. That the whole River doth sometimes pass with the Territory.
XIX. That things clearly desired become the next Occupants, unless the Propriety be held in general by some Prince or People.

Things may become ours by a particular Right, either by an Originary, or by a Derivative Acquisition. Originary Acquisition (when men began first to allocate together) might also arise by Division, as we have said; but now by Occupancy only.

But some men may haply say, That somewhat of Originary Right may also be acquired by some service done, or by reason of some Pledge, &c. But to him that thoroughly weighs the matter, it will appear, That this is no new Right unless it be in respect of the manner; for it was first virtually in the dominion of the Lord.

Paulus the Lawyer, to the Caufes of Acquisition, adds this, which indeed seem natural, if we our selves have given being to that which we claim as ours. But since nothing can naturally be made without some pre-exiting matter: Now if that be ours, the Species being introduced, the dominion will be continued. But if the matter pre-existing belong to none, then shall the Right be acquired by a kind of Occupancy: But if it belong to another, then that the Right of Propriety defends not naturally unto usalone, will appear by what follows.

Now let us examine, Whether that Occupancy, which after those first times, is the only natural means of gaining Propriety, be also the Originary. Of things that properly belong to none, two things are subject to be held in Propriety; namely, Empire and Dominion, as it is distinguished from Empire: Which Seneca thus differenceth. Ad Reges potestas omnium pertinet, ad sagulos Proprietas; To kings appertain the Sovereignty over all, to private men the Propriety or Dominion of what is theirs. And a little after, Rex omnia Imperio possidet, saguli Dominio; Kings hold all by their Sovereignty, and private men what is theirs by Dominion.

And again, Caesar omnibus habet, Fiscus autem privato tanti quantum & una; Caesar hath all, yet is his Exchequer private only, and his own. So Symmachus concerning Kings, To Rule all, but preferre to every one his own. Of the same mind was Dion Pionensis, Regio civitatis effe, at non eumin in ea fiam quisque posside; The whole Country is under the command of the City, yet in it every man enjoys his own. So faith Pliny, The Empire of a Prince is much greater than his private Patrimony. Now there are commonly two things that are subject to Empire; First, Perfons, which alone sometimes suffice; as in an Army of Men, Women and Children, seeking new Plantations. Secondly, Lands, which are called Territories. And although both Empire and Dominion are usually gained by one and the same Art, yet are they in themselves distinct: So we find in ApolloDoros, That the Lands as well in Arca- thia as in Africa were divided, yet the Empire remained in one only. And therefore although the Dominion or Propriety of things do natually pass not to Subjects only, but sometimes
sometimes to strangers, yet may the Sovereignty still remain where it was before. Sici-
lus, in the Book that he wrote concerning the condition of Lands, tells us, That the Fields
belonging to their own Colonies being insufficient, they took the care to assign and divide the
Land, did apposilion to such of their Citizens as came afterwards, such Fields as they had taken
out of the Neighbouring Territories, containing themselves with the bare possession, without leaving
the Jurisdiction o\er them unto those whose the Territory was. Democritus calls those Fields which
lay within their own Territory, Inheritances; but those that lay in another's, Properties only.

But in a place where Property is already possessed, the right of Occupancy, as to things
movable may by the Civil Law be anticipated, as we said above. For this Right proceeds from
the Law of Nature itself, and requiring it, than commanding that it be assertible. Neither indeed doth Humane Society require it. And if any man should object, That the Law of Nations seems to justify it, I shall answer, That although in
some parts of the World it commonly is, or hath been so received, yet did it never amount to a Compact, or general Argument among all Nations, that it should be so: but is rather from the Civil Law of many Nations distributed, which notwithstanding may by any particular Nation be rejected. As indeed there are many other things which our Civil Lawyers seem to justify by the Law of Nations, when they treat of the di-
vision of things, and of the manner of acquiring Property and Dominion.

This also must be observed, That if we respect the Law of Nature only, no right of
Property can be admitted to those who have not the use of reason. But the Law of
Nations; for the common good, doth indulge this favour unto Infants, Idiots, and
Mad-men, that they may lawfully receive and retain the property of things. All Manki-

In the mean time favouring, and as it were fulfilling their persons: For humane
Laws may constitute many things that are preternatural, but not any thing that is against
nature. And therefore that Right of Dominion that, in favour to such, is by the un-
animous consent of all Civilized Nations thus introduced, may lawfully confer with the
first act of Dominion, which is a power to have and to hold things in property, but
not with the second Act, which is freely and voluntarily to dispose of them by themselves
without a Guardian. For as to the Right of alienation and the like, because in their own
nature they imply the act of a Will guided with reason, which Infants and Mad-men have
not: Therefore doth not the Law permit these acts unto them. Whereunto the Apo-

Sages. 1. The People though be Lord of all the Inheritances, yet during his mon-

age is no better than a Servant; that is, as to the use and free exercise of his Right. We have
heretofore begun to treat of the Dominion of the Sea, which we shall now compleat.

Rivers may be held in Property, though neither the Water above nor beneath be in-
cluded within our Territories, but do cohere with both, or with a part of the Sea.
It is sufficient to denominate them ours, that their greater parts, that is, their banks on
both sides, wherein they are included are ours, and that that River, in respect of the
Land adjoining, is but a small thing.

But by this it should also appear, that the Sea might have been held possessed by him that
on both sides possesseth the shore; yet, although it be open above, as a Gulf, or both
above and below, as a branch of the Sea, so as it be not in great a part of the Sea, that
being compared with the Lands, it cannot reasonably be thought to be a part or portion of
them. Now what is lawful to any one King or People, may also be lawful to two or
three, in case they are willing to possess the Sea running alike, between them. So we have
been seen great River gliding between two Territories, occupied by both at first, but at last divided.

It is granted, That in those parts of the Sea which were subject to the Roman Empire,
from the former ages, till the Reign of the Emperor Justinian, the Law of Nations
did forbid that any one people should challenge any Right peculiar to themselves in the
Sea, though it was only the Right of Fishing. Neither can we approve of their opin-
ions, who think, That when the Roman Laws do tell us, That the Sea is the Common
Right of all, it is to be understood only of all the Roman Citizens: For first, the words
are so general, that they cannot admit of such a limitation; For what the Latins render
in these words, Omnium Commune; The Common Right of all: Theophrastus expounds by
these, καθ' ἐσθένον ἡ θάλασσα, Common to all men. And Ulpian tells us, That the Sea is
by nature as open and free for all men as the Air. And so doth Cicero assure us, That the
use of the Sea is to all men alike Common. Besides, Civilians do manifestly distinguish the
publick things of the people, among which they reckon Rivers, from those that are
Common to all men: For so we read in the Constitutions, That some things, by the
Law of Nature, Common to all, and some things are Publick; By Natural Right these things are
able Common to all, The Air, Running Water, the Sea, and the shore adjoining: But all Ri-
vers and Ports are Publick. The very same also we read in Theophrastus and others. Concern-
ing the Sea Coasts, Neratius was of opinion, That they were not to publick as those
things which are in the Patrimony of the people; but as those which Nature at the first
discovered

V.

That the
Right of Pol-
fishing things
movable may
be Law
prevented.

VI.

Upon what
Right the Do-
mination of In-
fants and
Mad-men is
grounded.

VII.

That Rivers
may be po-

cedd in our
own proper
Right.

VIII.

Whether the
Sea may be fo.

IX.

Not fos of old
in some parts of
the Roman
Empire.
The Sea: and the Shoar how held in Propriety. BOOK II.

discovered, but were never since in the occupancy of any, not of any one people: Which seems to contradict that of Celsus, who faith, That to what place over the Roman Empire did extend it self, there the shoars are, as I conceive, the people's of Rome: But the Sea, as to the use thereof lies Common to all Men. Which seeming Contradiction may be thus easily reconciled: Nepotam speaking of the Shoar, as to the necessary use thereof to Mariners, and to such as pass by, faith, That it is naturally Common; but as to any benefit or profitable Improvement of it, by erecting Forts, or other durable Buildings, so, as Celsus well observes, it is peculiar to the People of Rome. For, as Pomponius likewise informs us, nok Buildings could not be erected without special Licence from the Prætor, either on the Shoar, or in any part of the Sea, which was contiguous to the Shoar, and so reputed as part of it.

Though these things be true, yet doth it arise from Custome and Consent, and not from the Law of Nature, that the Sea, in that sense taken as is before declared, is not occupied, nor by right could be. So the King of Denmark having seiz'd and encaptured some Merchants Ships of Hull, for Fishing on the Coasts of Norway, near Flond, without leave, our most wife Queen Elizabeth pleaded, That the belt Lawyers had adjudged the Sea to be free, and by the Law of Nations, Common to all; nor could be Interdicted by any Prince. And as to Custome, the answer'd, That neither his Great Grand-father, nor his Grand-Father, nor his Father had ever exacted it: But on the contrary, That his Father had granted, That the English abstaining from Injuries, should have freedom of Fishing without leave. For Rivers also are publick we know, and yet the right of Fishing in some corner or creek of the fame River may properly belong to some private person. Nay, even of the Sea it fell, it is said by Paulus the Civilian, That where it is the proper Right of some particular person, he may have an Injunction to quiet his possession: for this is now a private cafe, for as much as it concerns the Right of Possession, which properly appertains to private, not publick causses; where doublets, he treats of some small portion of the Sea let into some private mens ground: Which we read was usually done among the Romans, as by Lucullus, and others; And, as Salust tells us, by many private mens in his time, who had subverted many mountains, and made Seas out of dry Land. Whereunto Horace thus alludes:

Whilst Mountains into Seas are cast,
Fish frightened from theirholds, dostand agast.

The like is recorded by Paternus, We, faith he, inflect huge hills of earth into the Sea; and when we have made Mountains hollow, we let in the Sea to fill up the Cave. Pliny likewise speaking of the earth, faith, That it must be embowered to let in the Sea. With what great Bulwarks, faith Cato speaks, are the Sea banks decently inva-aded? How far doth the Earth encroach into the Bowels of the Sea? So that as Thucydus writes:

Tho' untam'd Seas with Mountains are immo'd,
That Fish from Winters storms may be secure'd.

Varro writing of L. Lucullus, faith, That having cut through a Mountain near Naples, and thereby made a passage for the Maritime Rivers into his Pond, he had so great plenty and variety of Sea Fish, that Neptune himself had not more. Plutarch also records the fame of Lucullus, That having surrounded his Villages with Trenches and Channels even from the Sea, and so stored them with Fish, he made his Banqueting-house within in the Sea itself. So doth Pliny, That having at a vast charge dugg through a Mountain and let in the Sea, he was by Pompey the Great, called Xerxen toga-rum. The very like doth Valerius Maximus record of C. Sergius Orata, Who by letting in the Sea at Spring-tides, and intercepting its going out, made Seas peculiar to himself: But the very same we find afterwards produced by the Emperor Leo, in opposition to the opinions of the Ancient Lawyers, about the passages of the Thracian Dolphin: namely, That they might be inclofed within certain bounds, and posseth as a private
vate estate. Now if any part of the Sea may be annexed to a private mans estate, as being environed by it, and in respect of the Land, so small in proportion that it may be deemed as a part of it, and that the Law of Nature did not oppose it; why may not that part of the Sea which is contiguous to the Shoar be reckoned as a part of his, or their dominions whole the Shoars are? Especially whilst that part of the Sea being compared with the Territory, is no greater than a small creek of the Sea, compared with the greatnes of a private mans land, wherewith it is encompassed. Neither will it much alter the cafe, to say, That those Shoars are not on all sides surrounded, as may be easily illustrated by the example of a River, that is not every where begirt with Banks; or by the example of the Sea, that for conveniency of Imporrtion is let into some Town, adjoyning to the Shoar. But there are many things indulged unto us by nature, which the Law of Nations, by common content do prohbit: wherefore where this Law is in force, and not by common content repealed, no one part of the Sea, though for the most part surrounded by the Shoar, can be claimed by any people as their peculiar Right.

yet as to any profit that may arise from that part of the Sea, that is contiguous to the Shoar, as by Fisjing or otherwise, it may by cutoome or content be poiffed by the Prince whose the Territories are. For the diftinct dominion of that part of the Sea bordering on the Territorie of any Prince is beft by the Taxes and Tributes which those Princes take of Strangers for Fisjing, whereas we have many precedents: As in Ruoffe, where the Tax for Fisjing is very great; insomuch that the Hollanders gave the tenth Fifh. Denmark takes great Tribute at Ward-hoofe and in the Sound: As also for Fisjing in the North Sea, and even for Navigating that Sea between the Coasts of Norway and ISland, as the Merchants of HUll lately found by fact experience: as Sweden also did heretofore when Norway was theirs. All the Princes of Italy do the like for Fisjing on their respective Coasts in the Mediterranea. The Earls of Orkney in Scotland took the tenth Fifh for the Isle of Gruthe. So do the Lords of Mannors in the Welt of England, for Ditlhards, Hake and Cangre. The States lay Impositions upon the Fifh taken within the Seas and Streams of other Princes, also on those taken on their own Coasts. Edward the Third of England took 6 d. per Tun in his time, which is now as much as 18 d. And reolved to set up the Fisjing Trade in England, considering that it was mos proper for him to do, in respect of his dominion in the North Sea. Queen Mary let a Lease of the Fisjing of the North parts of Ireland for twenty one years for a certain Fine, and 1000 l. yearly Rent to be paid into the Treasury of Ireland. The Hanstownes had liberty of Fisjing granted them in those Seas 1 Mar. upon some conditions, as appears by the Rolls of Chancery. And for the Fisjing in the North Seas, Licences were usually granted at Scarborouh Caffle. King James let out a Proclamation 1609. to restrain all Strangers from Fisjing on the Coasts of England, Scotland, and Ireland, without Licence to be yearly granted.

But this alfo is to be observed, That where this Law of Nations is not yet received, or now abolifhed, the base poiffion of the Coasts is not sufficient to entitle any people to a Right in the Seas adjoyning. Nor is it enough for a Prince to conceive, or to write himfelf Lord of the Seas, unlefs by fome Overt Act he proclaim himfelf to be fo. Besides, That Dominion that is acquired by occupancy may be defeifred, and then the Sea returns to its primitive nature; and is Common to all, as the Shoars are, being deli fure of buildings: and as the Right of Fisjing in Creeks of a River, as Pompeiulus notes.

But mofl certain it is, That the Right that is gained by Occupancy, extends not fo far, as to give a Right to Impede any Nation from the benefice of a free paffage; fo as it be meerly for Innocent Commerce and Traffick, but not for depredation, or fuch like acts of Holftiity; seeing that even by Land we allow the like freedom of paffage, which ufually is lefs neceffary, and more offenfive.

But that the Sole Sovereignty over some parts of the Sea, without any other Propriety, may be held, may more easily be evinced: Neither (as I fuppofe) can the Law of Nations, whereof I have spoken, gain-lay it. The Arguez charge it upon the Athenians, as a manifefl breacht of their League, For that they had fuffered the Spartans, being their enemies, to pafs through their Seas unmofted; whereas it was expressly provided againft in the faid League, That neither party fhoold permit the others enemies to pafs διὰ τῆς θάλαττας, through any part of their dominions. And (as Thucydides records it) when the Grecians had made a truce for fome years in the Peloponnesian War, it was allowed to the Megaron, That they might freely and fafely pafs through their own, and their Confederates Seas. So likewife Dion Caffius describing fome part of the Sea, doth it

And question left, though the Sea be naturally free, whether Strangers may fish in eight parts of the Sea that joyn to the Shoar of another Prince.

XI. How much of our Commerce and Traffick is fuppofed to be gain'd, and how much is loif'd by the Sea.

XII. Such Occupancy hinder's not our Right to Traffick innocently by Sea.

XIII. That the Sovereignty over fome parts of the Sea may be poiffed, and how.

N 2 thus,
thus, *All that Sea belonging to the Roman Empire.* And Themistius also concerning the Roman Empour, faith, That his dominion reacheth over Sea and Land. And to the fame purpole is that of Oppianus to the Empourer,

The Seas do know no others Laws but thine.

*Diom Proseens*, among the many priviledges given by *Augustus unto the City of Tanis*, adds this, That he gave then the dominion over the River Cydas, and over the Sea adjoining thereunto. *Demosthenes* faith, That the Lacedemonians governed all, both by Sea and Land: And he that wrote the life of *Timaeus* relates, That after such a time, the Lacedemonians laid down their long continued claim, and voluntarily yielded unto the Athenians the Sovereignty over the Sea. *Curtil* of the City of *Tyre*, faith much to the fame purpole, That she sate as Queen in the midst of the Sea, extending her dominion not to her Neighbouring Seas only, but to all others whithersoever her Fleet should ride. *Philo* the few, discoursing of Kings, faith, That they add to their possessions Seas infinite in number and extent. So he that penned that Oration concerning *Halonese*, which is inserted amongst those of *Demosthenes*, speaking of *Philip of Macedon*, faith, *All that be defiles of us is*, That we would confess our selves unable to defend the Seas without him, and therefore that we would put him into the possession of them. And the Empourer *Julian* speaking of *Alexander*, faith, That he endeavoured by that War to make himself Lord both of Sea and Land. Now what *Alexander* endeavoured to do, his Successor *Antius* claimed as his right, as appears by that Speech of his in *Carianides*, *Nonne terra & mare men sunt? Are not both the Sea and the Land ours?* So also did his other Successor *Ptolomy*, if *Theocritus* deceive us not.

*O're many Seas and Lands his Empire reacht.*

And again,

*All Lands and Seas, and roaring Rivers, lyt*  
*Under the Empire of King Ptolomy.*

Now let us descend to the Romans: Hannibal himself thus bespake *Scipio* the Greater, We Carthaginians are confined within the Confins of Africk, whilst ye Romans are known to lord it over Foreign Kingdoms, both by Sea and Land. And of the lesser *Scipio*, *Clanbian* writes thus,

*With Rome's great Power, first in Revenge, he awes*  
The Spanish Ocean, under Roman Laws.

All the Roman Historians do every where call the Mediterranean Sea their own: As *Saluto*, *Florus*, *Mela*, and others. But *Dionysius Halicarnassensis* owns them as Lords, not of the inland Seas only, which he bounds with Hercules Pillars, but of the Ocean, as far as it is not impossible for men and Ships to fail. And *Casius* grants, That their Empire extended almost as far as there was either Sea or Land. *Appian* describing the vastness of their power, assigns unto them the *Eu鑫*, the *Propontis*, the *Hellespon*, the *Aegaeum*, the *Pamphilium*, and the *Egyptian* Sea. And *Plutarch* makes *Pompey* Lord of all that Sea that lay within Hercules Pillars: So doth *Appian.* This also doth *Philo* against *Flaccus* acknowledge: *Since which*, faith he, *the Family of the Cesar's have got the Empire both of Sea and Land.* *Ovid* also speaking of *Augustus Cesar*, faith,
And Suetonius likewise records it in honour to the fame Augustus, That during his
Regina the Temple of Janus was twice shut up, he having so often made peace with all Na-
tions both by Sea and Land. And in another place he tells us, That the fame Augustus
kept continually two great Fleets, the one at Milenum, the other at Ravenna, for the
defence of the Upper and the Nether Seas. So also Valerians Maximus tells Tibirius,
That by the unanimous consent of both Gods and men, the Seyervantry of the Seas was com-
mitted to him. The very same doth Philo testifie of the said Tibirius, That his Em-
prise comprehended both Sea and Land. And therefore Josephus utiles Vespasian, Terra
Marsiqve dominum, The Lord of Sea and Land. The like thiso Aristides in many
places attribute to Antonius the Emperour. Procopius tells us of several Statues of
the Emperour Jophinian erected in many places, as holding in his hand a Globe,
thereby intimating, That both the Earth and the Sea were subject unto him. And Con-
stantius Monomachus is said in History to be Terra Marsique Imperator & Dominus,
Emperour and Lord both of Land and Sea. Thus was the Ancient Sea made a part of
the Roman Empire: And yet Procopius gives the Dominion of the Sea, at and a-
bout Marieilles to the French. The like do other Historians give to the Venetians in
the Adriatic Sea. Now the Dominin in any part of the Sea may in the same man-
ner be obtained, as other Empires are; namely, as is above said, either by the
number of men, as when their Fleet (which is nothing else but Exercitus Mariti-
ms, a Sea Army) doth usually ride in such a part of the Sea: Or by reason of their
Territory, when from the Land they can command those parts of the Seas adjoining as
fully, as if it were all dry Land.

Wherefore it cannot be thought repugnant either to the Laws of Nature or Na-
tions, for such Princes as shall undergo the Charge of maintaining Fleets, to se-
cure Passengers from Pyrates, or of Sea-Marks or Land-Lights, to guide Mer-
chants through dangerous places, to impose equal and indifferent Tolls upon such as
shall receive benefit by them. Such was that which the Romans imposed on all
MERCHANTS that sailed by the Red Sea, to compensate the Charge they were at,
in sending out every year a Fleet with certain Bands of Archers to secure them from
Pyrates that infested those Seas. And that Toll, which the Byzantines required from
those that sailed through the same Seas, whereas Herodian makes mention in the
Life of the Emperour Severus. And that also which the Athenians did anciently
exact, when they held Clysopolis in the same Sea, as Polybius testifies: and that which the
fame Athenians required from those that sailed the Hellepsont, when they had tak-
enn Byzantium, as Demophenus records. The like doth Procopius mention in his
Secret History of the Romans in his time. The Rhodians also exacted Toll from the
Greeks, for securing the Seas from Pyrates; yea, and from Pharos at Alexan-
dria, as we read in Ammianus. The like doth Cohar testifies of the Venetians, whose
Seas being Tempestuous, and having but few Ports which they themselves held, they made
all that traffic in those Seas pay Toll. So likewise Florus concerning the Romans, That
having left the Seyervantry of the Sea, and the Islands being taken from them, they
were ashamed to pay that Tribute, which they themselves were wont to command. The same
Procopius above mentioned, as well in his Publick, as Secret Histories, speaks of
an ancient Tribute paid in the Hellespont, as also of a new Impostition exacted in the
Straits of the Euxine and Byzantine Seas, the one paid at Blackheurn, the other at
Abydos, which was called Neptunensis, that is the tenth of the Freight, which was
afterwards leaved by the Emperour Irene, and lastly by the Emperour Immans
Cunonm granted unto certain Monasteries, as Balsano informs us upon the Fourth
Canon of the Council of Chalcedon, and upon the Twelfth Canon of the Seventh
Synod. The Danoes in Queen Elizabeth's Reign, required a Rofe Noble of every
Ship: and one piece of Money in the hundred, and laffage for securing the English
Sailers through their Seas, to Muscovy. Neither would they permit the English to
fish in those Seas, without leave, or at yearly Toll.

Some precedents also we find of Leagues, whereby one Nation is bound to an-
other, that they will not fall beyond such bounds. So it was of old Articled be-
tween

Camden Eliz.,
Proo. 1582.
& 1602.

Some people
by agreement
forbidden to
fall beyond
such bounds.
Some People forbidden to sail beyond such Bounds. BOOK II.

Observe, that in that League it was provided, that neither the Romans should approach the Carthaginian Shore, nor the Carthaginians, the Roman Shore. Such another League there was made, between the Romans and the Tartessines, whereby it was provided, that the Romans should not sail beyond the Promontory Lacinium. So in the second League that was made between the Romans and the Carthaginians, it was agreed, that the Romans should not traffic, nor take any Prizes beyond the said Promontories Pulchrum, Mafa, or Tarfesium; as also, that the Romans should not touch upon the Coasts either of Africa or Sardinia, unless it were to receive fale Conduct, or to repair their Ships. And after the Third Punic War, we find the Carthaginian Senate blamed, for that contrary to their League, they had raised an Army, and were making Naval Provisions. The like we may read of the Sultan of Egypt, that by a League made with the Gracians, he had obtained liberty to send two Ships every year, through the Straits of Bosphorus. But yet were not all thev sufficient to prove, that either the Seas or the Right of Navigating them, may be held in Propriety by any one or more people. For, Nations as well as persons, may by contract and agreement among themselves, relinquish not only what is properly their own, but what belongs unto them in common with all other Nations, in favour to those who may reap benefit by it. And yet in this case we say not, that the Seas could lose their freedom; but that the people contracting and their furnellor are obliged to perform their contract and agreement; that to the Law of buying and selling may be preferred. And therefore both the present Occupants, and they that should succeed in their Right, stand obliged by that contract.

Controversies do frequently arise between neighbouring Nations, whose Territories are separated by the Intervention of some great River, whether it often as that River shall change its course, the bounds of both Empires do change with it; and whether, what that River, by altering its course, takes from one, doth of right belong to the other: which dispute cannot be determined, without first knowing the nature and the manner of the Tenure. Surveyors tell us, that lands are of three several kinds; some are divided and inclosed with artificial fences: some again are aligned by meature in grofs, as by hundreds of Acres or Furlongs; and others are called Arcifinia, because (as Varro hath observed) Nature hath fenced them with such bounds as are sufficient to secure them from the Incursions of an Enemy; as with Mountains, Woods and Rivers. Pliny speaking of the Alps, saith, We carry away such things as Nature ordained for Boundaries to separate Nations. And such Lands are also called Occupatory, because commonly they are such, as being wafte and desart, or being gained by the Sword, are held by occupancy. In the two former kinds, although the River do change its course, yet is nothing changed of the Territory, but what is gained by the River, is the Occupants. But in those that are Arcifinian, that is, which Nature hath thus bounded, the River in altering by little and little its course, doth also alter the borders
Borders of the Territories. And whatsoever the said River shall cast to the ad-
verse part, shall be accounted his, to whose Territory it is added; because it is very
credible, that both people did at the first agree, that the midst of that
River should be the Natural Boundary of both Empires. Tactius accounts the
Channel of the Rhine sufficient to bound the German Empire. But Spartianus tells
Adrian, There are many places wherein the Barbarians are divided, not by Rivers,
but by Land marks. And Confastine calls the River Phasis, Ceyrey, the common
boundary. Diodorus Siculus reciting the Controversie that there was between the
Egeianes and the Selinumb, faith, That the River parted both their Territories.
And Xenophon calls the like River, simply δόξος, i.e. the Horizon or Bound-
deer. The Ancients record it of the River Archelous, that because it kept no
setled or constant course, but sometimes branched it self into smaller Streams,
and sometimes (like a Serpent) running in an oblique or indented Channel, it
gave frequent occasion of War between the Aetolians and the Acarnanians con-
cerning the Lands adjacent, until Hercules immur’d it with Banks: For which er-
vice Oenus King of Aetolia gave him his Daughter in marriage.

What I have hitherto said holds true, in case the stream do not change its Chan-
nel. For a River as it divides Nations, is not to be understood barely as a
Current of Waters, but as waters running in such a Channel, and included with-
in such banks. Wherefore though in some particular places, it may gain or
lose, on either side, by reason of the weaknes of the banks, or the violence
of the Stream, and thereby beget some small alteration: yet whilest the whole
body of the River retains its wonted form, the River seems to be the fame.
But if the whole River do at once change its Channel, then it is another
thing. And therefore as when the old Channel is damned up with banks of earth,
above, and the waters thereby turned into a new one, which is dugg purposely
to receive them, the old eating, it is called a new River: So, if the old Chan-
nel shall be forsaken by reason that the waters have found out a new pallage,
it is not the fame River that it was; but the old being loft, the River is to be
accounted new. And as a River, though dried up in a time of extrem drought, yet is
each Territory bounded with that mediety of the Channel that is next unto it;
because it may be safely presumed that it was the will and intention of either
people, to be naturally separated by the midst of that River: And that in case the
River should dry up, that either of them should hold what they held before, so it
is likewise, if the water shall wholly forfake the Channel. When question is made of
the bounds of an Empire, those Territories that do reach unto some great River,
are always reckoned to be Archifinous, (that is) naturally bounded, because nothing
is so fit to bound Nations, as that which cannot easily be pulled over; But that King-
doms should be bounded by either Land marks, or by admeaurement is rarely
seen; and where they are so, it cannot be thought to be done by Original acquisition, but
by confent.

Although where the bounds of Empires are doubtful, (as I have said,) each
Territory is presumed to extend to the midst of the Channel, yet it may and some-
times doth so fall out, that the whole River belongs to one Empire only; name-
ly, when either the River was preoccupyed, before the Empire on the adverse
bank began; or when the matter was so determined by the confent of both Na-
tions.

Neither should it escape our observation to know, That such things as have
been occupyed, in case they be defrayed by the occupants, and have then no
owner, may be held by him that shall next seize them, as by primary acquisition;
because what no man can claim a right to, returns to its prifinie condition, and
are really his, that can first apprehend them. But this also must be considered,
That new discoveries are sometimes made at the charge of the Prince or people,
That not only the Empire and Sovereignty, (wherein confils that eminent right
whereof we have already discovered) but the private and full Dominion there-
of, should in the first place be generally vested in themselves; and after such
inveiture, then that it may be so distributed by parcels to private Families,
that their Title should still depend upon the right of the first discoverers, if
not as that of a Vaifal upon his Patron, nor as that of a Fee-farmer upon his chief
chief Landlord, yet in some other more mild, and eafe manner, as there are many ways, whereby we may claim a right to a thing. Amongst which is the right, of a man, that hath but an estate expectant, committed to him though but in trust for another. Thus Seneca, It follows not, because thou canst neither sell, waste or exchange what thou hast, that therefore it is not thine. Tuum enim est, quod sub certa lege tuum est; For that also is thine, which is but conditionally thine. And again, Quodam quorumdam sunt sub conditione; To some things men may have a Right, though with some restraint and limitation. To the fame fense is that of Dion Pruisenfts, There are many ways and those very difTerant, whereby things may be called ours; for a right we may have to a thing, although we can neither alienate it, nor use it at our own pleasure. The like I find in Strabo, Dominus fuit dempso vendendi jure; It was his by right, yet had he no power to sell it. Now very oppo- site to what hath been here faid, is that which Tacitus records of the Germans, Who configned to fuch a number of people, fuch a proportion of their fields to inhabit, which they presently divided, apportioning to every man, according to the honour and esteem they had of him. By which means feeing that every mans Estate depended on the publick; if at any time it should fall out that any part of the whole wanted an owner, it was not his that could next feize it; but it fheathed, either to the people in general, or to fome Superior Lord. And thus we read that in fome places, the goods of fuch as died without children, were feized to the use of the people, and that there were certain Magiftrates appointed to administer them. For lo Enfeathius interprets that of Homer,

Participanter opes redivae urbis;

The City Rulers did his wealth divide.

Some fuch Law (as Histories inform us) there was ancienfly in force in the Kingdom of Mexico: and haply the Civil Law may have introduced fuch a kind of right in fome other fuch like cafes, as we have now begun to obferve.
Of a Prefumed Delerelition and the following Occupancy: And wherein it differs from Prescription and Usucapion.

Note. Usucapion respects things moveable; Prescription, things immoveable. The former must be three years po1lelf; the latter ten; but if the party be abfent, twenty.

1. Why Usucapion or Prescription strictly taken, is of no force among diverse Nations or their Governours.

II. That among these are usufally pleaded, long Possessions.

III. The reason drawn from humane conjeсtures, and thofe not from words only.

IV. But from deeds alone.

V. And from fome left undone.

VI. How Time, joined with non poſsession, and a non-claim is fufficient to ground our conjeсtures of a Delerelion.

VII. Ordinarilу Time out of Mind fufficient for fuch a conjecture; and what that time is.

VIII. An Objeсtion answered.

IX. That feting aside conjectures, even by the Law of Nations, Dominio may seem to be transferred by poſsession time out of mind.

X. Whether the Right of fuch as are unborn, may be thus taken away.

XI. That even the Right of Sovereign Power, may be thus gained by either King or People.

XII. Whether the Civil Laws concerning Usucapion and Prescription, do bind them that have the Suprem Power, explained by a diſtinction.

XIII. What Rights do either separably, or communicably adhere to the Suprem Power, may be either got or lost by Usucapion or Prescription.

XIV. That Subjects may at any time lawfully afser their own liberty, refufed.

XV. Thofe Rights that are meerly in our own power, no time can take away.

A Notable Question doth here arife concerning a long continued poſsession; For seeing it is the Civil Law that gives life and being to this Right, (For Time in its own nature hath no effective power: For nothing is done by time, although there is nothing that is not done in time,) it can be of no force, as Vafquins obferves, between two free Nations or Kings, no between a King and a free People, no nor between a King and the Subject of another Prince, nor yet between two private Subjects of two feveral Kings or People. Thus were the English Comissioners answefed, demanding Cofje upon the Prefscription of Two Hundred and Thirty years, That Prefscription of Time took no place amongj Princes. Cand. An. Reg. Elec. 10. For as we read amongst the Laws of the Twelve Tables, Eternus Authoritatis cium hujfe jive; Our claim againft an Enemy, i.e. a foreigner, is everlasting: (So likewise in things ftilm, the right Owner never lofeth his property. For the word Authoritatis, in that place signifies the Right of Dominio) which holds true, unlefs it be when either the Tiling or Act is held, by the Laws of the Territory. But yet in admitting this, one main inconvenience would come, namely, that Titles to Kingdoms, and Controversies concerning their bounds, would never be at an end: which would not only procure much trouble and perturbation of mind among many, and occasion matter for War, is but repugnant to the common lene of all Nations.

For, both Jepthah in the Sacred Story defends his Title againft the Claim of the King of the Ammonites, unto all that Land lying between Aaran and Jabeok, and from the ArabianDefersunto Jordan, by an uninterrupted poſsession for three hundred years, and demands of him, why in fo long a time, neither he, nor his Ancefors did ever challenge thofe Lands. And the Lacedemonians also in Socrates urge it, as a thing moft certain and granted by all Nations, That public poſsessions as well as private, might by long continuance take to deep root, and be fo strongly confirmed, that they could never be recovered, by which Right they difmisfied thofe that came to demand Moifera. And thus both the Laws of Socrates urge it againft King Philip, That length of time had rendered the Title indisputable.

And upon this very account, it was that the latter Philip told Titus Quinian, That as for thofe Cities which he had taken by the Sword, he was willing to fit them free: but for thofe that he had received from his Ancefors by a just and hereditary right of poſsession, he would not relinquifh them. Sulpicius pleading againft Antichus, shows, That because the Gracians had sometimes served in Asia, therefore to endeavour by War, after fo many years past, to reduce them again into bondage, was very unjust. And nothing among Hi-
florians is reputed more vain and foolish, than to require things long out of possession. To the like purpose is that of Cicero, With what colour of justice, can we deprive him of those Lands, whereof for so many years, nos, ages past, he hath been quietly possesse? And that also of Florus, Their Country notwithstanding which their Ancestors had left them, they held as firmly by prescription, as if it had descended into them by an hereditary Right.

What then shall we say? The effects of Right that depend upon the mind, cannot nor
withstanding by the sole acts of the mind be obtained, unless that act be declared by some overt signs: For to attribute so much of efficacy to the bare acts of the mind, as to create a Right, had been inconsistent with humane Nature, which cannot possibly understand them, unless exprest by some outward signs; whence it is, that those bare internal acts are not subject to Humane Laws. But there are no signs that can so clearly demonstrate those inward acts, as to render us infallible; for a man may dissemble his thoughts, and both mean and intend otherwise than he either speaks, or by some deeds pretends to do. And yet will not the nature of humane Society admit, that these internal acts of the mind, being sufficiently express, should have no efficacy; wherefore whatsoever is so sufficiently signified, shall be held for truth, and be admitted of as a good plea against him, that shall so express his mind, which if done by words, the case is plain.

By deeds that is understanded to be forsaken, which is cast away, unless it appear by some circumstance that it was so cast away only for a time, and with a mind to require it again. Thus a debt is said to be forgiven, when the bond is delivered up to be cancel'd: A man, faith Paulus, may renounce his inheritance, not by words only, but by any other indication of his will; as if he, who being the right owner of a thing, shall knowingly contract with him that usurps it from him, he may very well be judged to have released his own interest in it. And why this should not take place, as well amongst Kings and free people, as amongst private persons, no reason can be assigned: The like may be said, when a Prince shall give leave, or command his Subject to do that which cannot without safety be done, unless he be exempted from the penalty of the Law; it may be presumed that he is so exempted, for this ariseth not from the Civil, but from that natural-right which every man hath to renounce what is his own; and from a natural presumption, whereby every man is believed to will that, which by signs he sufficiently declares. In which fence that of Ulpian may rightly be understanded, where he faith, It is agreeable to the Law of Nations, that whatsoever a man accepts of in full of his debt, is a good discharge.

Under things done, are morally comprehended things not done, being considered with due circumstances; so he that is knowing and present yet is silent, seems to give his consent, which the Hebrew Law seems likewise to acknowledge, Numb. 30. 5, 12. that is, unless by some circumstance it appear, that either fear or some other accident, did restrain him from speaking; so is that given for loth, whereof there is no hopes of recovery, as a Lamb in the paws of a Lyon: So if a Merchant suffer shipwrack, his Goods causeth to be his own, though they be afterwards driven to shore, yet not immediately (as Ulpian notes) but when he gives them for loth, and useth no outward means to recover them: For in cafe he fend out and make enquiry after them, or promise a reward to thofe that shall find and restore them, the cafe is otherwife to be judged. So he that knows his own things to be by another man detained, and makes no claim unto them in a long time, unless some cause do manifestly appear, seems to do it to no other purpose, but to shew that he is willing to renounce them. And this is it that Ulpian elsewhere intends, where he faith, That an houte possesse for a long time by another, and no claim made nor rent demanded for it, seems to be deferted by the right owner. To exact Interests long since due, faith that good Emperor, Antoninus, is hardly just; for the not demanding it in so long a space, makes it probable that thou wert willing to remit it; and that by not so much as demanding it, thy purpose was to make thy self the more beloved and honoured, and thy Debtor the more thankful. Something like unto this will appear in custom, for even this letting aside the Civil Laws which are willing to admit it, (though limited to a certain time, and after a certain manner) may be introduced by a people that are Subjects, being long tolerated by him who hath the Supreme Power. But how long time is required to entitle it to the effects of a just right, is not determined, but left Arbitrary; yet so much is required, as is sufficient to signify a consent. Now that silence should be of so great force, as to justify our prejumptions of a Dereliction, two things are requisite: First, That he that is silent, knows that he hath a Right; for him that knows it not, silence cannot prejudice. Secondly, That his silence be free and voluntary, and not occasioned by fear or any other such cause, which if it appear, makes our conjectures at the Will, of no force.

That both these therefore may be thought to concur (though other conjectures may avail) yet is that of time most prevalent: For, in the first place, it is hardly possible that in a long time, a man shou'd not by some means or other, arrive to the knowledge of his own Right; time usually administering many occasions to the discovery of truth. Now if
Prescription; or, Time out of Mind.

If the right owner be present, much less time sufficeth to ground our conjectures, than if he be absent, letting side what is determined by the Civil Laws; so fear once imprinted; cannot suddenly be cast off, yet can it not be perpetual; length of time supplying us with many occasions and remedies, both by our selves and from others against fear; and for providing for our own safety, even by going out of his dominions whom we fear; or at least by making our prostitution concerning our Right, or which is better, by offering to refer our cause to indifferent Arbiters.

But because that time which exceeds the memory of man, is in a moral sense, infinite; therefore if claim be not made within such a time as any thing out of possession, it is a sufficient presumption that it is forsworn, unless some very strong reasons be brought to the contrary. And here it is very well observed by our most prudent Lawyers, That Time out of mind is not altogether the same with a Century of Years, though it be true that there is not much difference between them. For one hundred years is commonly reputed the term of a mans life, which doth well nigh make up three Ages or Generations; which the Romans seem to object against Antioco, to prove the injustice of his demands, in requiring those Cities, which neither he, nor his Father, nor his Grandfather, ever enjoyed. Thus Queen Elizabeth pleaded against the King of Denmark, for the fishing upon the coasts of Norway, and New Iland without leave, That neither his Great Grandfather, nor his Grandfather, nor his Father, had exacted it, and therefore concluded it to be unjust: Seeing also that the Sea is free for all by the Law of Nations.

Porphyry accounts thirty years for an Age, and Herodotus in the life of Severus, accounts three Ages for a Century: Philo also reckons in three hundred years, ten Kings to Reign in Egypt, so Plutarch records fourteen Kings to have Reigned in Macedon in five hundred years: And therefore the Emperor Justinian wisely forbade that any Title should be set on foot, that had been discontinued for four Ages.

But here it may be objected, That seeing that men do naturally love themselves and whatsoever is theirs, it is not easy to be preuemmed, that they will cast away what is their own; and therefore such Negative Acts though long continued, can be no sufficient ground to conclude a Dereliction. But we ought also to believe, as charitable of men, that they would not suffer another to live perpetually in a fin unpunished of, for any thing that is vain and pernicious, which cannot of times be avoided, unless we do grant such a dereliction. As concerning Empires, though they are held in great esteem among men, yet are they not without their bourneths; for if they be not well administered, they expose the Governor to the wrath of the Supreme Judge: And as the case were fall, when they that are Tutors and Guardians should waive the Orphans Estate with needlesst Suits at Law, about the Right of Tuteledge, or to use Plato's similitude to this very purpose: when Mariners in a Storm shall contend (to the endangering of the Ship) whether of them can beft flee her; so they are not always the best Patriots, who can be content to sacrifice the publick peace to their own private ambition, and not without the vallence and innocent blood, dispire, of which they can best provide for the peoples saftety. Highly exult'd by our Ancestors was that act of Antioco, who being driven out of a great part of his Empire by Scipio, and confined to that only which lay beyond Mount Taurus, gave hearty thanks to the People of Rome, for easing him of so great a burden, and for conferring his Dominions within moderate bounds. Of the very same mind seemed Jonathan to be, willing rather to forego his right to the Crown, than to destroy his Country with Civil Wars, so that he might be but next unto David, whom he loved as his own Soul, 1 Sam. 23. 17. (It is said of Otho, the Emperor, that in his life he was as dissolute as Nero, but in his death as honourable as any of the Roman Emperors; for rather than haras his own Country with internetle wars, he chose to dye reluqtantly by his own hands.) Among these many grave Sayings bequeathed unto us by Lucan, this in mine opinion, is not the least:

—orat.

But howsoever feeling that it much conduceth to the conservation of humane society, that Titles to Empires should at length become fixed and undoubted; therefore whatsoever proofs (though but conjectural) shall be brought in reference to that end, must be embraced.

VII. Time out of mind, what it is.

Time out of mind, not the same with a Century of years, though not much different from it.

Camb. Lit. at 1670.

An Age what.

VIII. An Objection answered.

Civ. pro Dei.

Lib. 1.

Vol. Max. lib. 4. 6. 1

Plut. vit. 9. then ad fam.

Titles to Empires should be fixed and certain.

O 2
The present state of Government not to be altered.

Lib. 35.

IX.

Whether the Right of the Unborn may be lost by Prescription. BOOK II.

Lib. 35.

Lib. 34.

X.

The Right to Empires may be got or lost: by Prescription.

braced with some grains of favour: For if Acurus Sicignus thought it severe to lose what for fifty years he had quietly enjoyed, how much more was that of Angisius, who esteemed him for a good man and a true Citizen, who would by no means alter the present State of the Common-wealth, but as Aletheidas in Thucydides speaks, would help to defend that form of Government which was then in being. Of the same mind was Isocrates, as appears by his Oration against Calumineus: And so was Cicero, who in his Oration against Rullius, tells the people of Rome, That it concerned him that would preserve peace to defend the present state of the Common-wealth, whatsoever it was. And Leyy also who faith, that every good Subject ought to rejoice in the present Government of publick affairs: But if there be any thing defective in what I have here said, yet against that presumption whereby it is believed that every man hath a will to preserve that which is his own, there is another more strong, that it is not credible that any man that would so preserve what is his, should not in so long a time lay some manifest claim thereunto by some fit signification of his Will.

But here it may be said, and haply not improbably, that this depends not upon a bare presumption, but that it was a Law introduced by the voluntary Right of Nations, that an immemorial and an uninterrupted possession without any claim or appeal made to Arbiters, should be of force to transfer an undoubted Dominion: And therefore when Phocas was given to the Elders of Capua by the Gallican Emperors, Gregorius tells us, That there was a Law added, that every of their Successors should declare in writing that they held it under the Title of Administrators, left by a long continued omission, the right of the Emperor should be excluded: For it may easily be admitted, that what did so highly conduco to the publick peace and common benefit of mankind, might by the consent of all Nations pass into a Law. But this must be understood of an uninterrupted possession, that is, as Subfitus in Leyy speaks, Such a possession as is held by one and the same perpetual form of Right, always continued and never intermitted. And as the same Leyy in another place expreseth it, A continued possession that was never controverted: For if it be inconfiant and defultory, it avails nothing, as the Numidians sometimes pleaded against the Carthaginians, That sometimes the Numidian Kings, and sometimes the Carthaginians, held the possession, as opportunities and advantages offered themselves to either of them, and at all times he that was strongest held it longest.

But a more knotty Question yet remains, namely, Whether the right of such as are unborn, may by such a dereliction tacitly pass from them? If we say it cannot, then neither can a long uninterrupted possession, add any certainty to Dominion or Empire, because there are few of them, but some that are unborn may pretend a Title to: If we say it may, then it will seem as strong, how silence can prejudice them that could never speak, as having as yet no existence; or how the fact of one man may damnifie another. To resolve this we must know, that he that hath no visible being, can have no right; as that which hath no existence can have no accidents: wherefore if the people, from whom all right of Sovereignty did originally proceed, may change their will; surely they cannot be to induce tho' that are as yet unborn, seeing they have as yet no acquired right. But as the people may change their will expressly, so may they be believed to do it tacitly; and therefore it being granted, that the people have changed their will; and that the right of those who are as yet unborn, doth not exist, but that the Parents of whom they may be born, and who had a right in the mean time to have preferred it for them did relinquish it; what should hinder but that what is thus deserted, may be occupied by another. Many examples we find in Histories of such Derelictions, the most eminent is that of Lewis the Ninth of France, whom we find renouncing for himself and his children, all that right which, by his Mother Blanche, he might have claimed to the Kingdom of Coffile. And those renunciations, which the Infanta's of Spain do usually make, whenever they marry to the Kings of France, are of force to devour them, and their Children, from all pretensions to the Crown of Spain. For thus much may suffice to be spoken of that right which is natural.

For by the Civil Law, as many other Fictions, so this also may be introduced, that the Law may, in the mean time, sustain the persons of such as are unborn, and may so pro vide, that nothing shall be polled by any other, to their prejudice; as the Civil Law doth for the inheritances of Infants and Idiots: But whether the Law will do it or not, is not readily to be presumed, because what thus conduces to the particular benefit of these, may haply much endanger the Common-wealth. There is no doubt, but that such a right may be established by the Civil Law, as cannot lawfully be alienated by any one, which, notwithstanding, for the avoiding of the uncertainty of Dominium, may by the neglect of claim in some certain time be lost, yet fo, that they shall afterwards be born, may have their personal Action against those by whom neglect they have lost their Right, or against their heirs.

By what hath been already said, it is plain, that a just Title may be gained by one King against another, and by one free people against another, not only by express consent,
fent, but by dereliction and the occupancy following it, creating (as were) thence a new Right or Title unto it: For as to that general maxim, *Quod ab initio non valent, ex post facto constat se non possit,Those Titles which were originally taught, cannot by any post factum be made good,* is to be understood with this exception, unless some new case do intervene, which, of it self, is apt and able to form a new right: And by this means, that is, by a manifest dereliction and a long possession, he that is a true King, may lose his Kingdom and become a Subject to the people, and he that was really no King, but a Prince, may become an absolute King: And that Sovereign Power which was once wholly in either King or People, may at length come to be divided among them.

But here it is not altogether unworthy our pains to enquire, Whether the Law of Ulitication or Prescription, having the flamp of the Sovereign Power, may bind him also that made it; or whether the very rights of Empires, or their necessary parts, which we have elsewhere explained, are subject to this Law of Prescription, and uninterrupted posession. Some Civilians are of opinion that they are, and those not a few, especially of such as handle questions concerning Sovereign Empire according to the Civil Law of the Romans. But, we, with some others, are of another opinion; for that a man should be bound up by Laws, it is required, that in the Law Maker there should be both a power, and a will (at least strongly presumed) to do. But no man can properly impose a Law upon himself, as a superior upon an inferior; for then the person commanding and the person commanded, would be one and the same: And from hence it is, that he that hath power to make a Law, hath also a power to change that Law, (and consequently not only to command according to Law, but to command sometimes the Laws themselves for the general good.) And yet a King may bind himself by his own Laws, though not directly, yet by reflection, namely, as he is a part of the Body Politick, and so in natural equity ought to be conformable to the whole, as Saul in the Infancy of his Reign is laid to do, 1 Sam. 14. 40. So in a Ship, the Captain satisfies two persons, one common with the rest, being carried also along with them, the other proper, as he is Governor, both of the Ship and those that are in it. But here we look at the Law-giver, not as apart, but as one in whom the power of the whole is contracted: For in this place we treat of Sovereign Power as such: Neither is it easily to be believed, that it was the will of the Law-maker to comprehend himself under the Law he makes, unless it be where the matter and reason of the Law is universal, as in the apprising of Commodities, and the like. For there is not the same reason, that the Sovereign Power should be bounded and limited by the Law, as other things are, it being in dignity far above it; (for if we once admit it to be absolute and supreme, we must allow grant it some Privileges and Prerogatives above and before others.) I never yet found any Civil Law that treated of Prescriptions, that could with any probability be understood to include the highest powers: Hence then we may conclude, that neither the time limited by the Civil Law, can suffice to acquire a Sovereign Empire, or any of its necessary parts, in case these natural Conjectures, whereof we have here treated, be wanting: Nor is it such a space of time required, if within that time sufficient conjectures of Dereliction shall appear. Nor lastly, doth the Civil Law, which forbids things to be acquired, within such a certain time, at all appertain to the things belonging to the Supreme Power: Yet might the people in the first Creation of the Empire have appointed their will, by what means, and in what space of time, the Government by not using it should be lost, which Will of course, ought without doubt to have been followed: Nor could it then have been infringed by the King himself, though invested with Supreme Power, because it appertain not to the Empire it self, but to the manner of holding it, as we have elsewhere explained it.

But what things forever are not essential to the Sovereign Power, nor belongs unto it, as its natural proprieties, but may naturally be either separated from it, or at least communicated with others, are also subject to the Civil Laws of every people, which are in force concerning Ulitication and Prescription. So we read of some Subjects who have gained by Prescription, that it cannot be appealed from them; yet so that always some appeal may be made from, namely by Petition, or some such like way: For that there should be no Appeal at all from any, is not consistent with the condition of a Subject, and therefore must needs appertain to Sovereignty, or to some essential part of it; nor can it otherwise be obtained, than according to the Law of Nature, to which the highest powers themselves are subject.

Hence it is easy to discern, how far forth we may admit of that which *Fædunus and others maintain, namely, that Subjects may at all times endeavour, if they can, to recover that liberty which belongs to a free people; because what was by force got may by force be regained: And of that which at first proceeded from the will, it is lawful to repent and to change the will; for both that Empire that was at first gained by force, may in time by the tacite consent of the people, yielding thereunto a willing obedience, receive a firm and established Right: As also that will, either at the first establishment of the

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**XII.**

Whether Kings are obliged by those Civil Laws of Ulitication or Prescription.

Kings not absolutely bound by their own Laws directly.

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**XIII.**

What is not inseparable from Sovereignty may be got or lost by Prescription.

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**XIV.**

That Subjects may at all times assert their own Liberty restored. *Fædunus restit.*
the Empire, or by a postnate fact, might be such as should give such a Right, as should not afterwards depend upon that will. It was an excellent Speech that Josephus records of King Agrippa, to those Jews, who from their preposterous endeavours to recover their lost liberty, were called Zealots: Intempeftrum eff, mune libertatem comprobare, almo ne en amatoriter certaminis oportuit; To contend now for your liberty is unfeasible, this ye should have done before ye had lost it. To be enslaved to another is grievous, the miseries of War are to be preferred before it: But if being by the fortune of the War reduced into bondage, ye attempt to free your felvses, Non amantes libertatis dicovs eftis, fed servis comminacis; Ye will not be thought to offend liberty by rebellion. So Josephus himself to the same Jews, Honefiam eff pro patria pugnae, &c. To fight in defence of our Liberty whilst we have it, is honest, may honourable; but having long since lost it, now to endeavour by Arms to recover it, is to make our condition, which was before tolerable, now desperate. Thus did Cyrus in Xenophon answer King Armenius, who would fain have executed his defection by his earnest desire of his loft liberty, yet notwithstanding I make no question, but that a long continued patience in a King (as I have above described) may be sufficient for the people to recover their liberty upon a presumption of a Dereliction.

Neither are those Rights lost by Prescription, that are not exercised frequently, but may be once at a time convenient, as the right of redemption of things morgaged or given in pledge: As also those Rights of our free liberty to do such other acts, whereunto that act already executed is not directly contrary, but is rather comprehended in it, as a part is in its whole. As in case a man hath entred into an Association with one of his Neighbours only, and continued the same for an hundred years, whereas he was at liberty to have done the like with others also within that time; those rights of his liberty, I say, are not by Prescription lost, until being prohibited to execute it, or compelled to forgo it, he obeyes it, and sufficiently signifies his consent thereunto; which being congruous not only to the Civil Law, but to natural reason, may also be in force even amongst men of the highest fortunes.
Chap. V. The Right of a Father over his Children.

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CHAP. V.

How a Right over Persons was originally gained: Where also the Rights of Parents over their Children, of Matrimony, of Colledges or Societies, of Kings over Subjects, and of Masters over Servants, are difficult.

I. What Right Parents have over their Children.
II. This Right varies with their Age; Of Infants, and what right they have over their Estates.
III. Of their Right over their Children, being past their Infancy, whilst they are in their Family.
IV. What coercive power Parents have over them.
V. What right they have to sell them.
VI. What right they have over them when out of their Infancy and Family.
VII. Their power differing into Natural and Civil.
VIII. Of the Right of an Husband over his Wife.
IX. Whether the tying up of one man to one woman inseparably, be necessary to marriage by the Law of Nature, or of the Gospel only.
X. By the sole Law of Nature, the want of the consent of Parents nulls not a marriage.
XI. By the Evangelical Law, the marriage of another Wife or Husband, is ipso facto void.
XII. By the Law of Nature, the marriage of Parents with their Children is void.
XIII. So are marriages of Brothers and Sisters, of the Mother-in-Law with the Son-in-Law, &c. by the Divine Voluntary Law.
XIV. But of Kindred more remote, it doth not appear that by that Law they are unlawful.
XV. Some of those Contracts which the Law calls concubinage, may amount to marriages and be lawful.

Some marriages, though unlawful to have been done, yet being done, are lawful.

Of the right of the major part of a Society.

Where the Votes are equal, which part carries the Sentence.

What Sentences are to be divided, and what conjoynd.

The rights of the Absent are devolved upon those that are present.

What order is used among persons equal, even among Kings.

Where diverse Societies claim unequal shares in the same thing, their Votes shall be reckoned according to their respective parts in the thing.

Of the power that Cities have over their Citizens.

Whether Citizens may defect their City, explained by distinction.

No City hath power over her banished Citizens.

What power by consent a man hath over his adopted Son.

Of the right that Lords have over their Servants.

How far this right extends as to life and death.

What the Law of Nature determines as to those that are born into Servants.

Of servitudes there are divers kinds.

What power by consent one Nation hath over another, that freely subject it self.

What right is acquired over persons for some crime committed.

Kind of Right may be gained over Persons as well as things, and that either by Generation, by Consent, or by way of Punishment, for some delinquency.

By Generation, if both the Parents have equal right over their Children, yet, so, that if they differ in their Commands, the Father, as being of the more noble Sex, is to be obeyed before the Mother. Of this mind was St. Chrysostom. It is expedient, faith he, that the Wife should be subject unto her own Husband, for equality in honour begets quarrels. And St. Augustine also, A Son born in lawful wedlock, is more at the command of his Father than of his Mother.

In Children, we must distinguish their three different times: The first is that of their Infancy, whilst they are of unripe judgment, not able to know good from evil, not to distinguish truth from error. The second is, When they grow to ripe judgment, but yet continue in their Families. The third period is this, When they are separate from their Fathers and have Families of their own: During the first of these, all the actions of the Child ought to be regulated by the Parents; for it is but equal, that he that cannot govern himself should be governed by another, and naturally there is none to fit to govern the Child as the Parents. And yet by the Law of Nations, the Child is then capable of inheriting an estate, though he be justly restrained from managing of it by reason of his immature judgment. This was Plutarch’s observation, where he faith, That Children have a Right, Ds fort. Alex. Right, lib. 2.
The Right of a Father over his Children. BOOK II

II. The Second Period.  
While the Child is a part of the Parents Family.  

III. Of Parents coercive power.  

IV. Their power to fell them.  

V. Their power over them when separate from them.  

VI. The Rights of Parents are either Natural or Civil.  

VII. The Romans gave as much power over their Sons as over Slaves.  

VIII. A Right over persons by conquest.  

The Right, &c. but not &c. &c. to the Inheritance, but not to the use of it. Neither is it from the Law of Nature that all that is the Children, should be dispossessed of by the Parents; but from the Laws of some people, which do in this case sometimes distinguish the Father from the Mother, as they do also between their bond, and free children, and between the natural and legitimate: of which distinction the Law of Nature takes no Cognizance, except only of the privileges of Sexes, where both Parents contend who shall command the Child.

In the second period, when the Child's Judgement is ripened with his years, yet abiding in his Father's house, those actions of the child only are subject to the commands of his Parents, that are of moment to the well ordering of the estate of his Father, or of his mothers Family. For it is but reasonable, that every part should endeavour the welfare of the whole. But in his other actions he hath a moral power to do whatsoever of his own judgement shall guide him to, provided that in all things he endeavour as far as in him lies, to please his parents. But because this is a debt arising not by virtue of that moral faculty, as those above, but from the duty of piety, reverence, and gratitude; it cannot make void those actions of his that are otherwise done, no more than it will suffice to avoid any grant or gift, given by the right owner, to say, That it was against the Rules of Partition.

During both these spaces of time, Parents have a Right not to govern only but to punish, and to enforce obedience from their children, so far forth, as they ought to be either compelled to their duty, or to reform what is amiss. But as to greater punishments, we shall discourse elsewhere.

Although the Paternal Right be so inherent in the Fathers person, as that it can no ways be either taken from him, or transferr'd to another, yet naturally, if the Civil Laws do not restrain, the Father hath power to punish, or (if necessity require) to fell his son, if he have no other way or means to maintain him: Thus the Goth (as Formans records)otics of their Childrens safety, chiefs rather to preserve their lives than their liberties; and therefore in Compassion, thought it better to fell them to be kept and nourished as slaves, than to suffer them to dye in defence of their own freedom. Which Right other Nations seem to have borrowed from that old Thoban Law (recited by Alfin) which also forms to be derived from the Phoenicians, and also from the Hebrews, and by them to the Grecians, as Apollonius observes in his Epistle to Domaian. For Nature it self is presumed to give us a Right to all that, without which that which the commands, cannot be obtained.

In the Third space or period, that is, when the Children are grown to maturity, and in another family by themselves, then they are free to do what pleaseth themselves, always paying the duty of piety and reverence to them, which is an obligation never to be cancelled; whence it follows, that the acts of Kings are not therefore null, because they parents are living.

What power Parents have over their children more or less than this, they derive from the positive Laws of men, which in all Nations are not the same. So by that right that God gave unto the Hebrews, the power of a Father to null the vows of his Sons and Daughters was not perpetual, but only during their abode in their Fathers family: As may appear Num. 30. 2, 3, 4, 5 verses. For other wife the Son being parted from his Father, had power at thirteen years of age to bind himself without the consent of his parents. The Roman Citizens, being Fathers, had a peculiar power over their Sons, though they were heads of their own Families, before they were made free; which power they themselves confest that other people had not over theirs. So faith Sextus Empiricus, The Roman Laws gives as much power to parents over their children as over their slaves; for the goods of the Children were not reputed theirs, but their Parents, until they were admitted in the very same manner as their slaves were: Which other Law-makers rejected as Tyrannical. The like doth Philo record of them, All manner of power over the Son was by the Romans given to the Father. The same doth Simplicius tell us, The Ancient Roman Laws respecting as well the dignity of the Father, as their great pains and care in the education of their children, the better to rear them up in the firstbest bands of obedience without exception; yet (as I believe) presuming upon those natural affections, Et venundandi s i vellent, & Impune intercedendi, parentibus jus dedere potest; Gave the Parents absolute power either to sell, or if they would, to kill their own children. The like Power given to Parents over their Children by the Perfanis, Aethiopi condemnation as Tyrannical: Which I was therefore willing to infer, that so we might the more exactly distinguish between the Natural and Civil Rights of Parents over their Children.

The Right that is gained over persons by conquest, is gained either by Consciation, or by Subjection. Of that which ariseth from Consciation, the most natural is that of Wedlock, wherein all things are Common: Yet the Right of Command, which is the Prerogative of the Husband, as being of the nobler Sex, is not Common. For he is the head of the Wife, as well in Conjugal, as in household affairs: For the Wife is but a part
part of the Husbands Family: And therefore it is the Husbands Right to appoint Laws in his own house. But what Power ever it is that is given to the Husband beyond this, as by the Hebrew Law, the Husband had power to make void all the Vows made by his Wife, and by the Laws of some people, he had power to fell away all his Wives goods: This ariseth not from the Law of Nature, but from the voluntary Laws of men. And here it is requisite that we enquire into the nature and essence of Matrimony. And we find Marriage (taken naturally) to be nothing else, but such a cohabitation of a man with a woman, as placeth the Woman, as it were, under the eye, (that is) under the safeguard of the man. For such a Consecration we may obviate to be among dumb creatures. But because men are governed by reason, therefore it is required from the Woman that she be faithful and obedient unto her Husband, (for Subjection is rationally due to Protection.)

Surely Nature seems to require no more to the constitution of Marriage than Cohabitation and Protection. Neither did the Law of God require more before the publishing of the Gospel: For diverse holy men before the Law, had several Wives at the same time. St. Chrysostome speaking of Sarah faith, That it was some comfort against her barrenness, to have children by her husband, though begotten on her hand-maid; Nondum enim utinam venit eram; For such things were not as yet forbidden. So St. Augustine; There was then no Law given against the begetting of many Wives for propagation sakes. And in another place, Erat as rumplorum fumus folet adaudarum tum inculcabilis confuetudo; The Culfome of having many Wives at once, was then unblamable. And even under the Law we find some Precepts given to those that should have many Wives at once. And we find it expressly forbidden to their Kings to be excessive in accumulating either Wives or Horses, wherefore the Hebrew Doctors upon that place do limit their Kings to eighteen Wives and Concubines, and no more. And Josephus acknowledges, That to have many Wives at once was Nos patria, The Culfome of his Country. Therefore God himself seems to upbraid David; For that he had given him his Maffers Wives and Concubines, Quae injuste & legitimis habeat jussit; Whom he might justly and lawfully enjoy, faith Josephus. Neither was this knot of Marriage under the Law indiffolubly as now it is; For we find a precept Form to him that was willing to put away his Wife. Neither was any man forbidden to marry the perfon repudiated, but he only that put her away, and the Priest, who also is in the same place forbidden to marry a Widow or an Harlot. Now whereas Plato, and many modern Interpreters, do understand this to be meant of the High Priest only, by reason of that which follows, ver 10. It is evident by that of Ezek. iv. 22.

That every Priest was thereby forbidden; as may also be easily collected from the connexion of this seventh verse, with the verses preceding. But yet this liberty that was thus given to the woman that was repudiated to become another mans Wife, was by the Law of Nature, restrained to a certain time after her Divorce, to avoid confusion about her infamy.

To prevent which, the Jews did require, that there should be three months interval, between the Divorce and the future Marriages; whence the custom in Taurina, Whether a Woman having a child, might be married before her deliverance. But the Chriftian Law hath reduced this, as many other things besides, to a more perfect rule, whereby both him that puts away his Wife, unlefs for the act of Uncleanness, and be that marries her that is thus away, are both pronounced guilty of Adultery. And St. Paul, who was both his Apostle and Interpreter, doth give not only to the Husband the power over his Wives body, which he had before under the gale of Nature, (For he that joins himself to a Woman in Marriage, in corpus ejus habet dominion; hath power over her body, faith Arminius.) but to the Wife likewise power over the body of her Husband, thereby making the obligation mutual, and the transgression, either on part, equal. So

Lactantius, The Divine Law doth fo conjoin two persons in Matrimony, that is, into one body, 193. 6. 23.

on such equal terms, that whofoeuer shall violate this bond, or cut offender this knot, shall be report-

d by the whole people whom art to teach thy Wife chalfry, Iniquum est, ut id exigas, quod ipse præfisere non possis; It is very unjust to exact that from her, which thou canst not perform thy self. To the fame fentence, and almost in the fame words, speaks Nazianzenus, Being equally bound, quammodo exigis, quod non rependis? With what Confcience canst thou exact that which thou refusest to pay? To the fame purpose is that of St. Jerome to Oecacos, The Laws of Cæfar are one thing, and the Laws of Chrift another; Papinian commands one thing, and St. Paul another: By the former, the reins of our unbridled lusts are let loose; and Adultery only being condemned everywhere, Men are permitted to frequent the Stews and Brothel houses without restraint, Quæ dignitas culpam faciat, non voluntas; As if it were the Sex that made the crime, not the will. But with us what is unlawful for women is equally unlawful for men. The same yoke binds both to the like conditions.

There are some that are of opinion, That our bleffed Saviour in the fore-cited places, namely, Mat. 5. 32. and Mat. 19. 9. did not ordain a new Law, but only restore the...
What Marriages are by the Law of Nature, justifiable. BOOK II.

Answered.

Old: Alleging for themselves the very words of our Saviour, which seem to reduce us to the Original Institution, *Ab initio non fuit sic; From the beginning it was not so.* Whereunto we may answer, That from our first condition, when God to one man gave but one Woman; we may well collect what was best for man, and what most acceptable to God: And from thence conclude, That to walk by the same Rule was ever most safe and commendable. But we cannot from thence infer, That to have many Wives was sinful: For where there is no law, there can be no transgression. But in those times there was no such Law extant. So also, when God said, whether by Adam or by Adah, That this League of Matrimony was to be sacred and strict, that the Husband was obliged to separate himself from his Father's house, and together with his Wife plant another family: It was no more than what was said to Pharaoh's daughter, *Exod. 25, 11.* Forget also those own people, and thy Father's house. And although we may collect from this strong configuration, how acceptable it would be to God that it should be perpetual, yet it cannot from hence be evinced, That even then it was commanded that this knot should not be, for any cause whatsoever, dissolved. St. Ambrose, in the caufe of Polygamy, distinguishing that which Godcommands in Paradise to condemning the contrary. But Christ forbids any man to separate those, whom God by his first Institution did conjourn, making that a matter worthy of his new Law, which he knew to be best for men, and most acceptable to God.

Certain it is, that most Nations in ancient times did both indulge unto themselves the liberty of Divorces, and also of enjoying plurality of Wives. Of all barbarous Nations the Germans were well nigh the only people, recorded by Tacitus, that were contented with one Wife: But the Persians, Indians, and Thracians Histories do clearly tell us the lawfulness among them both of Polygamy and Divorces. Amongst the Egyptians their Priests only were restrained to one Wife. And amongst the Grecians, as Athenius tells us, Cerops was the first that allowed to one man but one Wife. And yet, that this was no long lived practice amongst the Athenians, we are taught by the example of Socrates and others. And if any people did live more abstemiously, as the Romans, who never admitted of bigamy, nor in a long time, of Divorces, they were certainly highly to be commended, in that they drew near unto that which was most perfect. And yet will it not hence follow, That they who did otherwise before the promulgation of the Christian Law did therein sin: For as St. Augustine rightly observes. *Quando nos erat, crimen non erat: Whilst it was a Crime it was no Crime; (at least not imputed as fo.)*

For want of discretion in this cafe, the Kingdom of Congo in Africa was unhappily diverted from Christianiety, which it willingly at first embraced; but afterwards with great Indignation rejected, for no other reason, but because plurality of Wives, was (I know not how needlessly but I am sure) more contentiously, than reasonably denied unto them. For where a vice cannot be rooted out, without the ruine of a fate, it is acceptable to God, for a time to convince it.

Now let us see what Marriages are good by the Law of Nature. To direct our judgments herein we must remember, That not everything that is repugnant to the Law of Nature, is made void by the Law of Nature; As appears by things prodigiously given away: but thole only wherein that principle is wanting, which should give life and vigour to the act; or in which, all its effects are vitiated and tainted. Now that principle which gives life to this and all other humane acts, is that Right which we expounded to be a moral power or faculty to do it, together with a will sufficiently declared. But what Will may be sufficient to produce a Right, we shall have occasion to declare more fully when we shall discourse of promises in general. But concerning this moral power, the first question is, Whether the content of Parents be by the Law of Nature requisite to a perfect Marriage, which some affirm. But herein they are mistaken: For all their Arguments do enforce no more than this, That it is agreeable to the duty they owe to their Parents, to crave their contents: Which we shall easily grant them, provided that the will of their Parents be not manifestly unjust. For if Children be to reverence their Parents in all things, surely they ought to do it most especially in such things wherein the whole Nation is concern'd, as in Marriages. And yet it cannot hence be inferred, That a Son hath not a Moral Right to dispose of himself, if they content not. For he that marries, ought...
ought to be of mature age and judgement, and he is to forfake his Fathers house, so that he is herein exempted from his Fathers domestick discipline. (And becomes from thence omnis, Master of himself.) And although the duty of love and reverence do oblighe him to ask the good will of his Parents, yet doth not the breach of that duty null the act of his Marriage. That the Romans and such other Nations did make void such Marriages was not from the Law of Nature, but from the will of their Law-makers. For by the same Law, the mother to whom notwithstanding the children do naturally owe reverence, could not by her defcent, make the Marriage void; no, nor the father of a free-man: And if the father himself be under the power of his own Father, then the contents of both Father and Grand-Father, are required to the Sons Marriage: But to the Marriage of a Daughter, the Grand-Fathers consent alone sufficeth. Which differences being altogether unknown to the Law of Nature, doth evidently prove, that they arise not from the Natural, but from the Civil Laws.

But as to Sons, if we respect strict and Natural Right, that of Quintilian will be found true. That if it be lawful for a Son at any time to do things otherwise unprosecutable, without, yet against his Fathers will, surely that liberty is never more justifiable than in Marriage: For as Cassiodore truly observes, Durum est libertatem liberam non habere in matrimonio, unde libera procreatorur; To be debh'd of our free choice in Marryam, from whence our Children should be born, is hard; nothing is more plain than that a Son in his Marriage should please himself.

That Marriage that is contracted with another mans Wife, is doubtles null by the Law of Nature, unless her former Husband have dissim her: For so long doth his power last over her, which by the Evangelical Law is not dissolved but by death. The latter Marriage therefore is null, for want of a moral power in the woman to dispose of her self, which being lost by her former Marriage doth vitiate all those subsequene effects that attend it; because every Act is but the invading of anothers Right. So likewise on the other side by the fame Law, a Marriage contracted with the Husband of another Woman is alike void, by reason of that power that Christ gives a chaste Wife over the body of her Husband.

Concerning Marriages between such as are nearly allied, or of the same blood, many difficult questions arise, which are often with much zeal and animosity agitated on both sides. Because he that shall undertake to assign certain and natural reasons, why these Marriages (that are by Law or Cuftome thus forbidden) are unlawful, should experimentally find how hard, nay how impossible, it is to effect it. That allledged by Plutarch in his Roman Questions, by St. Augustine in his Book De Civitate Dei, by Philo in his Special Laws, and by St. Chrysostome on 1 Cor. 15. 13. as the contracting of new Friends, and the strengthening our selves with new Alliances, favours more of Policy than true Piety: Nor are they of that force and energy as to conclude the contrary Acts to be either unlawful or void. Whereunto may be added, That some cafes there may be, wherein such prohibited Marriages may be more profitable and politic than others, as may be collected, not only from that which God himself in his Law given to the Jews, excepts, of raisin Seed to a deceased Brother having no issue: But from that also of a Virgin left by her Father, as sole heir of all his estate, who by the Grecian and Hebrew Laws, was to be Married to the next of kin, to preserve the name and Estate in their own Tribe and Family; and from many such like cafes which do, or may occur.

But yet from this general rule, we must except the Marriages of Parents with their Children in what degree ever, the reason whereof is sufficiently evident. For neither can the Husband, who by the Law of Matrimony, is the head of the Wife, pay that respect and reverence, that Nature bindeth him to give to his Mother, nor the Daughter to her Father: For though the be in subordination to her Husband by Matrimonial Right, yet doth her Marriage allow her to great a Familiarity with her Husband,as altogether inconsistent with the duty of a Child. Paulus the Lawyer was in the right, when having laid before,

Virgins not to chuse Husband for themselves.

My Nuptial Love to Parents care alone

Commit; for free choice therein have I none.

X I. It is a void Marriage that is contracted with anothers Wife or Husband.

X II. Of Marriages between kin.dred.

The Marriages of kindred sometimes profitable and politic.

That in contracting Marriages the Law of Nature and Modesty were chiefly to be regarded; he added, That it was against modesty for a man to make his own Daughter to be his Wife. And Philo in his Special Laws condemns it as an execrable wickedness to pollute the bed of his deceased Father, which as a thing Sacred, ought not to be toucht, and without regard to either the age, or the reverence of a Mothers name, to make himself both Son and Husband to the same Woman, and to make her both Mother and Wife to the same Man. Wherefore such Marriages are doublets not illegal only, but void, by reason of something which is vicious, which perpetually claves to the effects of it. Neither is that Argument of Diogenes and Christophus, which is drawn from the practice of Cocks, and such like dumb creatures, sufficient to prove, that such commixtures are not repugnant to the Law of Nature. For (as I have already said) it is enough to conclude any thing unlawful, that it is repugnant though but to humane nature. This is that Inceft which the Lawyers, Paulinus and Papirius, wrote to be by the Law of Nations committed, between the degrees ascendent and descendent. And this is that Law of Nature, which, as Xenophon notes, is no les a Law, because it was esteemed by the Persians, Medes, Indians and Ethiopianas, for which they were punished with perpetual Wars, Paricides, Fratricides, as Philo first, and after him St. Hierome obliuered: For as Michael Ephesio well interprets it, That is Natural, which is of common use amongst all Nations, as are uncorrupt; And that live most agreeable unto Nature. And therefore Hippodamus the Pythagorean calls these incestuous commixtures, inordinate and unnatural lusts, unbribed passions, and abominable pleasures. Such were those of the Parthians, whereof Lucan thus complains,

--- Epulis vesana, meaque
Regia nonnullas exceptos legibus horret
Concubinis ---

With Wine and dainty fare, the Court inflam'd,
Of their unbridled Lusts are not aband'd.

And a little after,

--- Cui fas implores parentem,
Quid reor effenfas? ---

Who fears not with his Mother e'ye,
To him, what can be Pllary?

The execrable Cultome particularly among the Persians, Dion Phrapæns prudently attributes to their evil education. But here we cannot without wonder pass by that vain conceit of Socrates and Xenophon, who could find nothing reprovable in those incestuous Marriages, besides the disparity in age, whence barbarnels, or mis-shapen children must necessarily follow. For if there were no other reason than this to hinder such Marriages, surely it could no more invalid these, than the like disparity in years could render other Marriages unlawful. But that which is much more worthy of our enquiry is this, Whether among men, unbyalled by an ill education, there be not (besides that which, as I have said, is conceived in the mind and understanding) a natural abhorrence, even in our affections to conmixin, either with our own parents, or with the children issuing out of our own Loys; especially when we find the like even in some brute beast. For so amongst others, Aenobius tells us, where speaking of the honour of such unnatural Coitions, he faith, Quam non hominibus folic, sed animallibus quaque nonnullis natura unius subiect, & ingenio saepe committeri sensia ; Which Nature and common sense have instilled not into men only, but into some Beasts. Aristotele records a notable experiment of this in a Camel, who could not be induced to cover his own Dam, until his Keeper had covered her head over with an Hood, and so deceived him, but the Hood falling off whilst he was upon her, though he did the act; yet remembering what he had done, presently after he tore his Keeper that he killed him. The like he relates of a generous Colt in Scythia, which refused to cover his Dam, but being in like manner deceived, brake his own neck for very horror of the fact. The like Stories we read in Phiny, of an Horse that for the same caufe killed himself; and of a Mare that being likewise deluded, worried her Keeper to death. For, saith the Historian, these Beasts are not without some knowledge of their own kindred. Not much unlike unto this is that of Oppianus, in his first Book of Hunting; and of Varro in his Second Book and Seventh Chapter de re rustica: And to the like purpose is that of Seneca in his Hippolitus,
CHAP. V.

Inceftuous Marriages.

Fere quaque ipsa Venereis evitant refus,
Generifique leges Incefa servat puder.

Ev'n Beast themselves do from their Damis refrain,
And taught by Nature, chapter Laws maintain.

Another Question ariseth here, concerning the degrees of Affinity and Conflagnity in the cross line, especially of those mentioned Lev. 18. For though we should grant, that they are not interdicted by the moral Law of Nature, yet it is manifest, that they are forbidden by the express Will of God: And that not only to the Hebrews, but to all mankind, as may be collected from the various words of God himself, to Moses, Defile not your selves in any of these things; for in all these things the Nations are defiled, which I caste out before you, and the Land is defiled: Therefore do I visit the Iniquity thereof upon it; and the Land itself, seuereth out her Inhabitants. For if the Canaanites and their Neighbours did sin in all these things, and were punished for so doing; certainly they had a Law given them, which forbade the doing of them: Which Law, since it was not merely Natural, must needs be given by God, either peculiarly to them (which is not very probable, nor will the words bear that sense) or to all mankind, either at the Creation to Adam, or after the Flood to Noah. Now, such Laws as were given to all mankind, Christ did no where abrogate, but those only, which as an Hedge or Partition wall, did separate that Nation from all others. Besides, when St. Paul did so severely censure the Corinthian for marrying his Mother-in-Law, as he had no peculiar command from Christ to do so, do he utter no other argument to justify his severity, than this, That it was reputed unclean even among the profane Gentiles: Witness Cærendus his Law, which branded such Marriages with infamy. And that of Cæcero, in a cafe not much different from that of the Corinthian: For having first laid open the matter of fact, and proved the Marriage of the Mother-in-Law with her Son-in-Law, in defecation of so foul a crime, he cries out, O mulieris increditis sectar, & prater borne woman, in omni vita inaudium! O the incredible wickednes of a Woman, and but in this never heard of! When King Seleucus had a mind to give his Wife Stratonice to his Son Ammiocnus, Verebatur ne ipsa offenderetur ut rí illicita; He was afraid, saith Plutarch, lest she should take offence at it as a thing unlawful. For so it was in Virgil's account,

Thalamo æsium insecrare noverca.

His Bed with Incesf defset pollute.

Which general defection of these Inceftuous Marriages, if it derive not its origine from an immediate dictate of Nature, it must necissarily descend by ancient tradition from some precept given by God, to Adam, or Noah. The Ancient Hebrews, who herein were no mean Interpreters of the Divine Law, and Maimonides, who had read and with found Judgement weighed all they wrote, do assign two causes of those Laws concerning Marriages, mentioned Lev. 18. The first is, A certain Natural modesty which will not endure that Parents should mix with their own issue, either by themselves, or by such persons as either in Blood or Alliance are nearest unto them: The Second is for prevention of Fornications and Adulteries, which too much Familiarity and daily Conversation, without any watchful eye to restrain them, may occasion; especially if such wanton dalliances may be made good by lawful Marriages. Now if we would judiciously adapt these two causes unto those Divine Laws before-mentioned, Lev. 18. it will easily appear, That in those that are allied in the right line, either Ascendant or Descendant, (for we do not here mention that of Parents with their Children, which Natural Reason without any other Law, teacheth us to abhor) and in those the first degree of the oblique line, which becaufe of its immediate descent from the common stock, is usually accounted the second degree, by reason of that fresh and lively Image of the Parents in the Children; The former of the two causes above-mentioned is very forcible, as infuing from that which Nature her self doth, if not command, yet at least commend unto us as the more honeft: Of which kind there are many which afford abundance of matter, for Laws both Divine and Humane. And therefore the Hebrews do not precipitely tie themselves to the degrees of the right line, that are express in the Law, but comprehend under them many degrees, that are not there mentioned by a manifest reason of parf. The names whereof, with them, are these, The Mother of his Mother, the Mother of his Mothers Father, his Fathers Mother, the Mother of his Fathers Father, the Wife of his Fathers Father, the Wife of his Mothers Father, his Sons Wife, the Wife of his Sons Son, the Wife of his Daughters Son, the Daughter of his Sons.

XIII.

The degrees of Affinity and Conflagnity forbidden.

Lev. 12. 24; 25, 27.

Inceftuous Marriages forbidden by God, to Adam and Noah.

Eph. 2. 14.
1 Cor. 7. 25.

Prof. Cæcetric.
Sons Daughter, the Daughter of his Sons Son, the Daughter of his Daughters Daughter, the Daughter of his Daughters Son, the Daughter of his Wives Sons Daughter, the Daughter of his Wives Daughters Daughter, the Mother of his Wives Mothers Mother, the Mother of his Wives Mothers Father: That is to say, according to the Roman Dialect, all Grand-mothers and Great Grand-mothers, the Grand, and Great Grand-mothers-in-law, the Nephews, and Nieces Daughters, the Daughters of the Son-in-law, the Nephews Wife, and the Wives Mother and Grand-mothers; because there is the same reason for the kindred on the Mothers side, as for that on the Fathers: And so under the first degree is comprehended the second, and under the second the third. Beyond which it is not likely that any Coartoretic should arise, which might otherwise proceed in infinitum.

Now these Laws, together with that which prohibits Brothers and Sitters to marry one another, the Hebrews reckon among those which God gave unto Adam, which were these, First, That Enjoying the worship of God. Secondly, That, Commanding the ordaining of Magistrates, and the administration of Justice. Thirdly, That, Against the shedding of Innocent Blood. Fourthly, That, Against Images or idolatry. Fifthly, That, Against Rapine: And Sixthly, This, against Incest. Yet so, that this last was not to be in force till the world was well replenished with mankind, which in the beginning could not be avoided. Neither do they think it to the purpose to say, That Moses makes no relation of any such Laws given to Adam, forbidding such Marriages. For he thought it sufficient tacitly to couch it in the Law itself, wherein he declares, That the Nations were punished for these very sins: Which they could not justify have been, had there not been a Law given them, that did forbid them. There being many things recorded in the Law, not in order of time, but as occasion served to express them. It will nothing avail then to say, That these Incestuous Marriages were not sins, because there was no Law against them before Moses; for no more was there any Law then extant to punish Adultery with death: yet we find Thamar sentenced to death for it by Judah. So the punishment of the Suckemites by Simeon and Levi was just for ravishing their Sister Dinah, though we read of no Law then published against it. And the Incest of Reuben deferved his Fathers Curse, though the Law forbidding it was not recorded: For it was sufficiently condemned in this, That the Nations were cast out by God for these things; whereby it may probably be concluded, That God had given such Laws to mankind before Moses time, though they are but obscurely glanced at by him.

And indeed the Jews have a notable brave saying, which gives some light to those dark times, namely, that in their Law there is neither Prius nor Poetirius, First nor Last, for many things are reckoned without order. As touching the marriage of Brothers and Sitters, the very words of Michael Ephesius are these, For Brothers and Sitters to be together, was at the first indifferent; but when there was a Law that forbade such Coition, then whether that Law should be obeyed or not, was not to be questioned. And therefore Diodorus Siculus notes, that to abstain from such Commissions, was the common Custom of all men, the Egyptians only excepted: though Dios Ptolemaeus excepts also the Barbarians. Seneca wrote thus, We, faith he, join the Gods in marriage, but with very little pity; for we marry together Brothers and Sitters. Plato calls such Marriages, prophan and abominable before God. Whereby we may discern, how mean an opinion other Nations as well as the Jews had of these Incestuous Marriages, which they seldom mention without a Nefas, to teize their dislike of them. All Brothers and Sitters, as well on the Mothers side, as on the Fathers side, that is, as well of the half, as whole blood are comprized within this Law, whether they are educated at home or abroad, as is manifest by the Chaldee Paraphrast.

Now these Marriages being expressly forbidden, seem to justify, or at the least to tolerate those in more remote degrees. For to marry an Aunt, that is, his Fathers Sister, is expressly prohibited: but yet to marry his Brothers Daughter, which is equal in degree, is not. Such was Sarah to Abraham, as Josephus thought; Nay, there are diverse Precedents for this among the Jews: And after the Law given, the same Josephus gives us examples in Herod, who married his Brothers Daughter, and gave his own Daughter to his Brother Pheroras. There are certain Marriages lately contrived (faith Tacitus) which to us are strange, though not so with other Nations, because forbidden by no Law: Namely, that a man should marry his Brothers Daughter, which was held lawful among the Athenians, as (say) and Plutarch in the Life of Lycurgus record; whereas the Jews give this reason, Because young men do daily frequent, and are more usually brought up in their Grand-fathers and Grand-mothers houses amongst their Aunts, than their Aunts are in their Brothers amongst their Nephews, neither have they there so much Right. Which if we do admit, as it is indeed very agreeable to reason, then we must acknowledge, that the Law which interdicts Marriages with Kindred in the right degree, and with Sitters (from
The Marriages of Cousins Germans.

whence (sprung the whole race of mankind at first) is now perpetual, and obligeth all men, being grounded upon natural honesty: So that whatsoever is done against this Law, may be made Null, by reason of the Impediment, that is lasting and permanent; but what is done against other Laws, is not so, as being but cautionary against this, which may be otherwise provided against. Sure I am, that by the Nineteenth Canon of those that are called the Apostles, they that marry two Sisters successively, or their Brothers or Sisters Daughters, are only driven from the Clergy. And as to the sins for which God is fast to extirpate the Cannanities and their Neighbours, the answer is easy. For though the charge be general, yet it may be restrained to some principal heads in the charge; as to Sodomy, or Carnal Copulation with Beasts, with Parents, Sitters, other mens Wifes, &c. And that other Laws were added but as Fences and Retrenchments, to refrain men from violating these Laws, as the Hebrews thought. For that it was not to be understood of every particular in that charge is sufficiently proved, in that they were forbidden to have two Sisters, as Wives, at the same time; which that it was not at the first made to all mankind; the example and great piety of Jacob will not suffer us to believe; whereunto may be added that of Amram the Father of Moses, who married his own Aunt, as did diverse others, both among the Grecians and Romans. And yet I cannot but commend the great modesty of the Primitive Christians, who did not only of their own accord observe those Laws, which were given in common, to all Nations, but also which were given to the Jews' Nation only; yet, and did enlarge the bounds of their modesty, beyond those degrees forbidden them; that as in other virtues, so in this aile, they might be seen to excel them. And that this was done with a general consent, will appear by the Canons of the Councils.

Concerning the marriage of Cousins Germans, that which is in it itself lawful, is prudently avoided for its vicinuty to that which is unlawful: whereunto he presently subjoyns, That though it were the Religious Care of our Fore-fathers, after two or three defects, to renew their Alliances, by Interchangeable marriages, obstructing only, after the world was sufficiently stocked with men, from that of Brothers with Sisters; yet who can doubt, but that, honetius hoc rempare etiam confonbrinarum prohibita eft conjuncta; The marriage of Brothers and Sisters Children, is now more modestly forbidden. And that, not only for strengthening our soleos with new alliances; but also by reason of a certain natural and commendable bashfulness, which should restrain us from commingling such licentious arts with her, (of whom by reason of the nearness of blood, we should have a reverent esteem,) as even conjugal modesty we fee hath even blushed to own. And therefore St. Chrysanthus calls the marriage of Cousins Germans such a Conjunction as the Law forbids, because by this means the Stock is corrupted and tainted. Now this natural Shame-facedness, many Kings and Free People have by their Laws chorish’d and upheld. The Emperor Theodorus, as Victor reports, did so highly esteem it, that he expressly forbade the marriage of Cousins Germans, making but little difference between that, and that of Brothers and Sisters: Which Law St. Ambrose highly commends, as being full of Piety. Such another Law we find made by Arcadian and Honorius. The like Cæsareus relates of the Gals, who prudently following this example, did reserve the privilege of contracting marriages with Cousins Germans to their King only. And yet we must still remember, That not every thing that is forbidden to be done by Humane Laws, being done, is presently void, understanding that it be so signified by the Law it self. In the Council of Agathas, among other prohibited marriages, that of Cousin Germans also is mentioned; whereunto it is added, That the Council did not at that time, fo prohibit them, as to dissolve those that had been made. So Pandul the Lawyer faith, That marriages without the consent of Parents, was unlawful, but yet not to be disolved. So in the Elbcrine Council it was decreed, That if a man after the death of his Wife, should marry her Sister, and he be faithful, he shall be debarred from the Communion five years; thereby shewing, that the band of marriage was to remain undislolved. And by the afofayed Canon of the Apostles it was likewise concluded, That if a man did marry two Sisters successively, or his Brothers Daughter, he could not every thing that is done contrary to Law, is presently made void.

Notwithstanding it was not done.
he was only not to have been admitted into Sacred Orders, but the marriage was not void.

But that we may proceed to other marriages, it is to be observed, That some Concubinary Contracts may amount to true and authentick marriages: although they may be deprived of some effects peculiar to marriages by the Civil Law, or lose some effects that are natural, by renon of some impediment arising from the Civil Law. As for example, the accompanying of a Bond-man with a Bond-woman, was called by the Romans, Consuetum, a Conciliation, and not a marriage; yet it had nothing wanting requisite to the nature of marriage: And therefore in the Ancient Canons, it is called by the name of Wedlock. So the accompanying of a Free-man with a Bond woman, is not honoured with the Title of Matrimony, but of Wedlock: which by limitation, is since derived to other persons that are of unequal Conditions, as that in Athens between a Citizen and a Stranger. So Servus upon Virgil, calls those Baftards, that are born of obscure Mothers. And yet even these servile conjunctures were in Greece, Carthage and Apulia, reckoned as marriages, though the Hebrew would not honour them by that name, nor legitimize them without the content of those whole servants they were. For so they exposed that place of Exod. 21. where mention is made of marriages. And Cassiodore will inform us, that they were not to marry any woman of unequal condition to them; these, without leave obtained from their Prince. But certainly in the state of Nature, such unequal marriages may be Authentick, if the woman be under the custody and safeguard of her husband, and have plighted her troth to him. So also, under the state of the Evangelical Law, a marriage between two Servants, or between a Free-man and a Servant, is a firm and lawful marriage, much more that between a Citizen and a Stranger, a Stranger and a Free-woman, if these things which are necessarily required by the Dyer Christian Law, to the accomplishment of a marriage be added, namely, an indissoluble joining together of one man to one woman, although some effects properly due by the Civil Law to other marriages, do not attend these, or which of their own accord would follow these, were they not by some Law hindered. And thus are the words of the first Tenth Council to be understood, He that hath no Wife, but instead of a Wife hath a Concubine, may be driven from the Community, so as the consenting himself with one woman, whether she be his Wife or a Concubine, to be plainly forbid. Concerning such a Concubine, St. Augustine writes thus, If she should solemnly profess, that she will neither know any other man, although he to whom she is at present subject, should dismiss her: It may be worthy our point, to inquire whether she should not be admitted to Baptism. So in another place, A question doth often arise, In case a man and a woman being neither husband nor wife to any other, shall agree to tie together, not for procreation sake, but only to avoid Incontinency, and shall give faith each to other, never to enjoy any elfe, whether that may be called a marriage or no? And haply (faith he) it may not absolutely be so called, if they both agree, that this conjugation shall continue until death, and although the procreation of children were not the main end they proposed to themselves in their lying together; yet if they do not purposely avoid it, nor do any wicked aim, to the intent that children should not be born unto them. But if a man xever a Wife, he ought not to keep a Concubine, lest she strange his heart from his Wife. Hereunto likewise we may refer, that Theodotus and Valentinianus do call an unequal marriage a kind of Fornication, and that from thence, an Accusatior of Adultery is laid to arise.

Though the Laws of men do forbid some certain persons to be joyned in marriage, yet it follows not, that being married, their marriage is void. For it is one thing to forbid the doing of a thing, and another to make that void that is done: For the Prohibition may extend its force no farther than to some penalty, either express or arbitrary; which sort of Laws Ulpian calls Imperfect Laws: Quae siqur quod vetatur, sed faciunt non res inidiae: Which prohibit the doing, but reject not the fact done. Such was the Canon Law among the Romans, that restrained men from giving more than unto such a proportion, but did not make void that which was given beyond it. The Valerian Law (faith Livy) when it forbade the whippin out with Rods, or the killing with the Axe, him that had provoked or challenged another, imposed no penalty upon the breaker of the Law, but adjudged it to be improbe factum, disussely done (such was the modify of those time, when Injustice only was thought a sufficient guard to the Laws) whereas now, there is fearce any that will so mildly threaten his forswain. By the Pufian Law, none except some few particular persons was to receive by way of Legacy more than ten thousand Alixes, (which reduced to our Coven, amount to about one and thirty pounds ten shillings, reckoning every As to an Half Penny Farthing;) and he that received more, was to forfeit the Quadruple sum. Amongst these Laws that were called Imperfect, Macrobius reckons these which had no penalty annexed to the breach of them. Such was that refcript of D. Marcus, That Hier who forbade him to perform Funeral Rites, who was thereto appointed by the Tefator, did not rightly; nor he that ordered no punishment to be inflicted upon him that did it. We do acknowledge, that
that amongst the Romans, it was afterwards introduced by the Theodosian Law. That whatsoever was prohibited only by the Law, although it was not expressly fained, that what was done contrary unto it should be as null; yet if it proceeded to Judgment, it should be conftrued as unprofitable, void, and of no force: But this strained construction arose not from the force of the bare prohibition, but from the virtue of the new Law, which other Nations were not obliged to follow. For sometimes there is greater idenitie in the act doing, than there can be in the effects that proceed from it; and sometimes alfo the inconveniences which do follow upon the Receiption, or making void of the fact, are more than could enfue upo'n the doing of it.

Besides this of marriage (which of all Confociations is the moft natural) there are diuers others as well public as private; and thofe either over the people, or of the people: But all of them have this in common, that as to thofe things for which a Society is instituted, the whole, or the major part in the name of the whole, do oblige every particular in that Society. For it may well be premifed that it was the mind of thofe that first entred into that Society, that the power to determine all matters therein treated, should reft somewhere. But becaufe it would be apparently unjust, that fome few Perfons fhould impose upon the reft, where every Perfon hath equal power; therefore by the Right of Nature (letting afide thofe Orders and By-Laws which do prefcribe a Form or Method to the whole Society, in the handling and difcufling of matters that are brought before them) the major part fhould have the power of the whole. So Thucydides, That which the Multitude, or the greater part thereof, shall decree, is Authoritative.

Appianus was of the fame mind, As well in public Elections, as in Courts of Judgment, the greater part rules the reft. So also was Dionysius Halicarnas. That which seems best to the moft, must prevail: that is, Unles if it be otherwife provided by fome former Law or Agreement, that of fuch a number of perffons, fuch and fuch fhall be of the Quorum, whereof any two or more have power to determine: Yeas, though their judgment be not altogether fo righteous as it might be, yet, Eo quod major pars decretiv, ftetit, Because the major part hath decreed it, it must stand. Whereas on the contrary,

— In paucis jam deficiente caretur,
Nec perfona sit eft patriae, nec curia confult.

The Assembly being dissolved in two or three,
No fecture of Country nor of Court can be.

And by and by after,

— Infirmis minoris,
Vox cedat numeri, parvaque in parte quieta.

Of the fame Opinion was Xenophon, Who would have all things done according to the vote of the major part of the Suffragians: And in this fence doth, as well the Chaldee Paraphrafs, as the Jewifh Rabbins, understand that of Moses, Exod. 23. 2. Neither fhall thou fpeak in a caufe to decline after many to wrfet Judgment, which the faid Paraphrafs renders thus, Neither fhalt thou caufe to fpake thine own mind in judgment. Juxta Sententiam plurimorum perflic judicium, According to the opinion of the moft, give Judgment.

But if the Sentences be equally balanced, nothing can be done; because there is not any thing of moment fufficient to call the fcale: In which caufe if the Sentences be equal, the accufed fhall be held innocent: And this the Greeks call the Suffrages of Minerva, as Aeschylus and Euripides inform us. So where the Judges are equally divided in opinion, Poffefior rem tenet; The Right goes with the Poffeffion, faith Arifotle: And Seneca in one of his Controversies faith the fame, One Judge condemns and another absolves: Where the Judges are equal, and their Judgment so unequal, the milder Sentence must prevail. Neither is there any reafon, faith Seneca, that any man fhould envy that Power which overcomes onl y by flewing mercy. Nay the Jews go yet further: For if the condemning Part had but one fingle Vote more than the abfolving part, it ftood for nothing; as may be collected from the Chaldee Paraphrafs, upon that place of Exodus before cited, and by others; for fo alfo in all Logical Collections, the inference follows that part which is least grievous.

But here another Qufition arifieth, namely, when, and what Sentences are to be conjointed, and what to be divided? Wherein if we consider the Law of Nature only, that is, if no Law or Covenant have otherwife determined, we ought to diftinguifh between fuch Opinions or Sentences, as are altogether inconfiftent and differ in the whole, and fuch as differ only in part, that fo thofe latter may conjoint in that wherein they agree, though the former cannot. And therefore where the Qufition to be argued wraps up many things together, it is to be divided and difcuf'd in parts. Thus Seneca, when another

XVII. Of the right of the major part of a Society.

Lib. 5. Quad pluribus omnibus id valet.

Carthius l. 10.

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XVIII. Of the right of the major part of a Society.

Of the Right of the major part of a Society.

Which part carries the Sentence when the Votes are equal.

XIX. Where the question is not agreed unto, what is to be conjointed and what divided.
ther man delivers his opinion in a Question, whereunto I consent in part only, I desire him to divide that wherein I agree with him from that wherein I disagree, and I shall then join with him. As for example, they that adjudge a delinquent to pay twenty pounds, and they that adjudge him to pay but ten pounds, may unite in the ten against them that would acquire him. But they that confine a Malefactor to death, and they that confine him to banishment, cannot be reconciled, because death and banishment are incompatible; neither can that part that would absolve him, join with those that would banish him. For though they both agree that he deserves not death, yet is not that express in the sentence, but deductible from it by consequence: For he that would banish doth not absolve. It was therefore well observed by Plato, that when there shall happen to be such a diversity of opinions in a free Assembly, concerning one and the same thing, that they cannot be included in any one question, they would divide the matter into several and distinct questions; for it avails but little that two are displeased with the third, if in nothing they agree between themselves. Polybius justly taxeth Polibibinus the Prator with fraud, when in demanding the Judgment of the Senate, concerning the Graecian Captives, he joyns together those that condemned them, and those that would have had them detained as Prisoners for a while only, against those that would have released them. Such a question as this we shall find in Gellius, and another in Quintilian, where it is being agreed that of seven Judges, what punishment the major part should think fit to decree, the Malefactor should suffer; three adjudged him to Banishment, and two to be branded with Infamy, and three to Death: And when the Perfon so adjudged, pleaded, that four of his Judges agreed that he should live, and three only that he should dye; The Accuser defired him to recite the Judgment of the four; And when he began to say, Ts was sentenced me to Banishment and two to Infamy; he was presently surprised by his Adversary, That of two Sentences he made but one, and that the lesser number which being united had preferred him, being divided, destroyed him, and hence, when they are united, that so expressly divide themselves.

Whereunto also we may add this. That in all Assemblies, the Right of those that either by abstinence, or by consent, are hindered from making use of their Right, is devolv'd on that: that are present, yea, sometimes even to one single perfon, whose sole act shall be reputed the act of the whole. So faith Seneca, Think, thy self to be the common feruant, yet shouldest thou serve that Master that is present: Yet herein also, as well as in that general rule of plurality of Votes, humane Laws do make some exceptions; as namely, when they require that so many shall be present to make a Court (as in our Houfe of Commons;) or that the Perfons absent, may give their Vote by their Proxies (as in our Houfe of Peers.)

The order of Nature is this, that amongst equals he should be esteemed the first, that first entered into that Society; For so we find it is among Brethren, the Elders always precedes the rest, and after him the second, &c. Notwithstanding all other qualifications. All Brothers are equal (Bith Aristoteles) it is only their Age that makes them unequal, Theobald and Fadis, in designing the order that should be observed among Confuls, say, Of those who are in the same degree of honour, who should precede, but they that were first thought worthy of that honour. And the ancient custom among Christian Kings and States was, that they always preceded in such Councils as were called concerning Christian affairs, who first profest themselves Christians, as Eusebius Records in his History of the Council of Taffo.

But yet so often as the ground and main reason of entering into this Society, was the preservation of something held by them in common, but not in equal proportions: As in an Inheritance, or in a Field, wherein one hath half, another a third, another a fourth part. Then not only the order, but the suffrages of that Assembly shall be, not by the plurality of single Votes, but by the proportions that they severally have in the thing held in common; which as it is most agreeable to natural equity, so it is approved of by the Roman Laws. So Sestus tells us, That when Lychia with three other adjoining Cities, did unite themselves, as it were, in one Body; it was agreed, that each of the three was to have one voice, but Lychia, two; because it contributed much more to the common benefit than the rest: And the same Author tells us, that in Lychia there were twenty three Cities combined, whereof some had three voices, some two, and some but one, and accordingly all charges were divided and paid. And this is but just, faith Aristotle, if the defence of their common possessions were the chief cause of their Confederation.

Of all Societies, that of divers Masters of Families embodied in one City or Nation, as it is the most perfect, so it gives a greater right or power to the whole over every part thereof, than any other Society whatsoever. Neither is there any outward act done by any one Citizen, but what either by itself doth, or by circumstanf may, refer to the conservation of that Society: For as Aristotle tells us, The Laws do rule us in things of all sorts.
And here it may be questioned, whether it be lawful for Citizens to forfake their City without leave given. There was an ancient Custom, that he that transplanted himself into another City or Nation, did first remove that wherein he formerly dwelt, and then was received. And true it is, that in some Countries it is not lawful to forfake the City without leave; as in the City of Mafco: Neither do I deny that it is possible for a Civil Society to be enter'd into under some such Agreements; and that Citizens may introduce the force of such an Agreement. Yet by the latter Roman Laws, it was lawful for any Citizen to remove his Habitation, yet not so, but that he stood still obliged to execute such Offices in the City, as should be imposed on him: Neither were the to depart out of the Roman Territories, and special care was taken by the Law itself, that they should pay their Contributions. But setting aside these municipal Laws and Constitutions, let us discuss this question according to natural Right, and that not of any one part, but of the whole City, under the Supreme dominion of one Person. And surely that they cannot recede by Flocks or great Companies, is easily collected from the necessity of the end, which in moral things is able to create a Right: For if this should be lawful, there might infinitely follow a dissolution of that Civil Society. Zonaras speaking of King Lazarus, who revoluted from the Persians to the Romans, makes it the cause of a just War between the Persians and the Romans, that the Roman General had drawn unto himself the Subjects of the Kings of Persia. But as touching the departure of some particular persons from a City, it is much other wise: As it is one thing to draw water out of a River, and another thing to turn the course of it. Every Citizen (faith Triphoton) is free either to stay in, or to depart from his own City. And Cicero, in his Oration for Baldus, commends this Law, That no man should be forced to stay in a City against his will, and this he lays down as the foundation of Liberty, that every Freeman hath absolute power over himself, either to remain in it or to recede from it. And yet herein also we are to submit to natural equity, which was the Rule that the Romans walked by, in disfouling private Societies; that it should not be lawful, when the publick was dammify'd by it: For as Proculus rightly observes, Always not that which is profitable to some one of a Society, is usually to be observed, but what is expedient for the whole. But it is expedient for the whole Society, that in case any great publick debt be contracted, no Citizen should forfake the City, unlefs he have first paid his proportion of it: Also if upon confidence of the number of their Citizens, they have begun a War, but especially if they are in danger to be besieged, no Citizen ought to forfake the City, till he have first provided a Person as able as himself, to defend the Common-wealth. But unlefs it be in these cases only, it is probable enough that the people do give their consent that any Citizen may freely depart, because even from this liberty, they may make no less advantages to themselves some other ways.

So likewise no City can have any Right over those whom it hath banifhed, as we shall shew anon*. The Heraclida being banifhed Argo's by Euryfhen's, and afterwards perfecuted by him, do thus plead by their Advocate Scaurus: By what Right doth he persecute us now, whom he banifhed his City, for now we are no Subjects of his. And An ticiades his Son speaking of the times of his Fathers banifhment, tells the Athenians, that The Welfare of their City did nothing concern his Father. So likewise Nicetus speaking of Isac Angelus, faith, It is no new thing for any man to court and flatter his Enemy, but is very sensible that his own Countrymen do perfecute him as their Enemy. But now the confociation of several Nations (whether by themselves or their Governors) are called Leagues; of the nature and effects whereof we shall have occasion to speak, when we shall treat of Obligations which arise from Contracts and Agreements.

There are also voluntary juf&ections, and those either private or publick, the private vary according to the several forms of Government: that which is most noble is that of Arrogation or Adoption, whereby a man tranfports himfelf into the Family of another; fo as he behaves himfelf with that duty and reverence, as a Son of mature Age should do towards his own Parents. No Father can fufferly transfer his Paternal Right over his Son to another man fo fully, as to be altogether discharged of the duty incumbent on him as a Father: Nature it felf will not admit of fuch an alienation, but yet he may commit his Son to another man to be fed and educated by way of Subftitution.

The most ignoble of all Subje&ions is that, whereby a man gives himfelf up to perfect slavery: Such were they among the Germans, of whom Tacitus speaks, That fold themselves for food and rayment. And of fuch there were great numbers among the Graicians, who (as Dion Perieus notes) of Ereveëmen became Slaves, and performed their Service according to Articles of Agreement. Now that we call perfect Bondage, which yses a man during life to perform all manner of work, for no other reward but food and cloathing; which if it extend it felf to whatsoever condu&ute to the prefervation of Nature, is not much to be grieved at: For our continual labour is indifferentiy well recompenced with a constant supply of things necelfary for life, which they that hire out themselves by the day only, do
often wrote. This the Stoick Posidonius observed out of Histories, that many in ancient times, conscious of their own weakness to maintain themselves, voluntarily submitted themselves to be commanded by others, Constantly performing what they were able, and receiving from their Lords whatsoever was necessary for them. Like him in Plautus.

If I were free, the charge were mine;  
But being bound, that charge is thine.

No Lord can have absolute power over the life and death of his Slave, if we respect internal Justice: For no man can take away the life of another, and be guiltless, unless it be for some capital crime committed; and yet by the Laws of some Nations, he that shall kill his Slave for what cause soever, is indemnified, as Kings are in all Nations by reason of their vallt and unlimited power. For as Seneca notes, If a Servant dare not plead with his Master for fear of suffering the worst of torments, no more dare Subjects with their Prince, nor Soldiers with their General, who have all of them equal Rights, though under unequal Titles. No Master then hath a just power to injure his Slave, but only as That is sometimes improperly called just, which being done, is not punishable. Such a Right did Solon give to Parents over their own Children, and so did the ancient Roman Laws, witnesses that of Sopater, It was lawful for him, being a Father, to kill his own Children, if they offended; for the Law (presuming upon the Father’s Integrity) had permitted such a Right unto him: The like power, faith Dion, we find permitted in many Nations famous for wife and whilom Laws.

But of the children of Captives, which are born of Slaves in their Lords Family, there is yet a more difficult question: For by the Laws of the Romans, and of other Nations, concerning Captives (as we shall elsewhere shew) as of brute Beasts, so of people of a servile condition it holds true, that, Partus sequitur Ventrem; As is the Mother, so is the Child. But this notwithstanding is not altogether congruous to the Law of Nature, especially where the Father of the Child may be sufficiently known: For since even among dumb creatures, as Pliny observes of Doves, Amor utrique solus equius; Both Parents are equally concerned for their own young, thereby acknowledging their common interest in them. So also had not the Civil Law otherwise determined, the Child had followed the condition of the Father, no less than that of the Mother: For if the Son (faih the Visigoth Law) be born and created by both Parents, why should be follow the condition of the Mother only, who without the Father could not begot him? Among the Scythians, as also in some parts of Italy, among the Lombards and Saxons, the children are accounted either bond or free from their Father. The Laws of England judge of the Child, not by the Mother, but by the Father; for the Husband and Wife, being but one person in our Law, and the Wife marrying a Freeman, by the common Law of England, the issue is free: Which Laws, though different from the Roman Civil Law, yet, as Aquinas notes, do not much deviate from the Law of Nature. And why not, since among the Romans, by their Mensaes Law, if both the Parents were Aliens, the Child born of them was fo too, as Ulpian tells us. Now let us admit that both the Parents are Slaves, it is worth our pains to know whether naturally the Child be fo or not? And certainly if the Parents have no other means to breed up the Child, but in their Lords family, or at his charge, they have a power to deliver him up to the Lord for a Slave. For although the Child were ingenious and free-born, yet in such a case they have power by the Law to sell him: And in case the Parents were Servants to several Masters, then by the Law of Nature the Children were to be divided between their respective Lords. But if they had but one Child, then of right it belonged to him whole Slave the Father was, the Lord of the Mother being first satisfied for his half part; and yet of the Children of him that was born in the house of his Lord, two parts did accrue to his Lord, and but one to the Lord of the Mother, according to the Edict of Theodoric, as Cassiodore records. Now whereas I said before, that the Parents, if they had not any means to breed up their Children, but at the charge of their Lord, might deliver them up unto him as his Slaves; it may seem that this Power doth naturally arise from the supplying them with food and other necessaries, and therefore where there is no such necessity, as where there are other means to breed them, they have no right to sell them: And so it was adjudged by Charles the Bald, wherefore the Right that these Lords have in the Children of their bond- servants, springs from the many years Alimony that is given them by the Lord, before they could be serviceable to him, which they are to recom pense by their future labour. And for this cause, the Parents cannot dispose of them to any other man, neither may the Servant flee from his Lord, until full satisfaction be given unto that Lord for the charge of their education: But if the Lord be too unmercifully cruel, then that even they who have surredrended themselves as Slaves, may provide for their own safety by flight, is the most probable opinion, notwithstanding the charge given by the Apostle, and by the ancient Canons, forbidding Servants to flee from their own Masters; because those Precepts were general, and oppo-
Publilk Subjection.

XXX. There are divers kinds of Servitudes.

XXXI. Publilk Subjection by confcut.

XXXII. What Right is gained over persons by way of punishment.

Lib. 1. e. 3.

PUBLICK SUBJECTION.

fed only to that error which was then growing, namely, that denied all manner of subjection, whether publick or private, as being inconsistent with Christian Liberty.

Besides that slavery which is perfect, there are others imperfect; as those that are limited to a certain time, or to certain things, or upon conditions: Of such there were divers among the Romans, as that of their liberti, nexi, additi, afferipti globis, statu liberti: As also among the Jews, there were those that served seven years, and that bound themselves until the next jubilee, and then were free: And such were the Perseids among the Thessalians, and all Mercenaries, amongst whom are to be reckoned our Apprentices here in England, who for a certain number of years are under so hard a discipline, as both but little distinguish them from those of a servile condition, and such like. All which differences do depend, either upon some Laws or upon some Contrasets, his servitude also seems to be naturally imperfect, who is born of Parents, whereof one of them is bond and the other free, for the causes aforesaid.

Publilk Subjection is, when any one Nation or People do give themselves up to the power and command of another, either of one man or many, or of another people or Nation: The form of such a voluntary renditon, we have already set down in that of Capna: The like is that of the people of Collatia, Do ye give up unto me, and unto the jurisdiction of the People of Rome, the Collatine People, with their City, Fields, Water, Bounds, Temples, Utensils, with all things else whether Divine or Humane? We do, say they: And I except thereof: Whereunto Plautus seems to allude in his Amphitryo. All which the Persians comprehend under the general names of Earth and Water: This is an absolute Subjection; but there are some likememes that are not so full and absolute, in respect either of their manner of holding it, or of that arbitrary power of command, of the several degrees whereof we have already elwhere discuss'd.

There is likewise an involuntary subjection, when by reason of some delinquency, we forfeit our liberty, and are forcibly reduced into servitude, by such as have a right to punish us; and who those are we shall shew hereafter. And thus may not only private men be brought into slavery, as at Rome, Qui ad diilectum non responderet; He that refused to perform an Office, being thereunto chosen, and they that were not enrolled or registred in the number of Citizens; and afterwards women, who though otherwise ingenuous, yet if they married another mans servant, lost their own freedom. But the publick things of a Nation may be thus subjected, for some publick injuries done; but with this difference, that if the State be brought into captivity, it is perpetual. For, as in the Laurel, though the leaves dye, yet is the Tree always green; so though every person in that Nation be mortal, yet doth Succession make the people immortal: But in personal bondage, Nasa sequuntur caput, The punishment never exceeds the person offending; but both these servitudes, as well private as publick, being penal, may be either perfect or imperfect, according to the offence and punishment thereunto due. Now of that servitude, whether private or publick, that ariseth from the voluntary Law of Nations, we shall have occasion to treat, when we come to the direful effects of War.

CHAP.
Of that Right which is derivatively acquired, by the voluntary Fact of a man, wherein is handled the Right of Alienation of Empires, and Things thereunto belonging.

I. To make an Alienation valid, what is required from the Giver.
II. What is required from the Receiver.
III. That Empires may be alienated, sometimes by the King, sometimes by the People.
IV. That the Government over one part of a Nation, cannot be alienated by the people, if that part dissent or be unwilling.
V. Neither can one part alienate the Government over themselves, unless in case of unavoidable necessity.
VI. The Causes or Reasons of this.
VII. That the Empire over some places, may be alienated.
VIII. That no part of an Empire may be alienated by the King, either for profit or necessity.
IX. Under this Title of Alienation, all Estates and Mortgages are comprehended.
X. So under Empires are all other Jurisdictions which cannot be alienated but by the special consent of the People, or by Custom.
XI. No more can the Peoples Patrimony be alienated by the King.
XII. That the fruits and mean profits of the Patrimony, must be distinguished from the Patrimony itself.
XIII. Some parts of the Peoples Patrimony may be engaged by the King for debts, how far, and why.
XIV. That a mans Settlement is a kind of Alienation, and is warranted by the Law of Nature.

Hitherto we have spoken of Original Right: Now we are to treat of that Right which we derive from another, and this may be done either by the fact of the Person that gives it, or by some Law that warrants it; for that the right owners of things should have power to alien their interests, either wholly, or in parts, unto others (propriety being once introduced) is most agreeable to the Law of Nature: And therefore Aristotle places it in the very definition of Dominion, as if that only were truly and simply ours, which we have a Right to alienate. Wherein two things only are to be observed, one in the Donor, the other in the Donee: First in the Donor, the internal act of the Will only is not sufficient, unless it be declared by some overt act, as by words, or some other external signs. For of the inward acts of the mind, we are no competent Judges; neither is it congruous to the nature of humane society: But that there should be also a publick delivery of the thing transferred, is required by the Civil Law, which being now received by most Nations, is (though improperly) said to be required by the Law of Nations. So in some places it is required that every Alienation should be published, either before the People, or before the Magistrate, and that it should be also recorded; all which do certainly proceed from the Civil Law. But because every Alienation of a mans Right ought to be done with sound Judgment, therefore the acts of the Will, that are express by some overt signs, are to be understood the acts of a mind ended with Reason.

So likewise in the Receiver, setting aside the Civil Law, it is naturally requisite that he should express his willingness to accept of it, by some outward signs; which though it be usually subsequent to the tender of the giver, yet may it also precede it: As when a man requires that such a thing should be given him, in this case it is presumed, that he is willing to receive it, unless it do appear that he hath altered his mind; as to other things requisite, as well to the transferring, as to the acceptance of a Right in things, and both may be safely done, we shall shew more fully, when we treat of promiss; for concerning both these, Nature hath prescribed the same Rules.

As other things, so are Empires alienable by him, in whose dominion they truly are; that is, as we have said before, by a King whose Kingdom is Patrimonial: But otherwise by the people, yet not without the Kings consent, because he hath a kind of Right in it, though but to the present revenue, which cannot without his own act, be taken from him: Thus it stands with a whole Soveraign Empire.

But as to the Alienation of any one part of the whole, it is further requisite that that part that is to be alienated, contain thereunto. For they that first entered into that society, did (as may be presumed) contract a firm and immortal League among themselves, for the defence of all those parts which are called Integrants: Whence it follows, that
these parts are not so under their own body, as the members of a natural body, which cannot live without the life of the body; and are therefore for the preservation of the body sometimes junty cut off. But this body whereof we now speak, is constituted after another manner, namely, by mutual consent and agreement; and therefore its power over its parts depends wholly upon the will and intention of them who first instituted that society, who without doubt never would have granted such a power to the whole, as to abridge from it itself any of its parts, and to give them up into the power of another.

Neither is it, on the other side, in the power of any part to recede from the whole, unless it be evident, that it cannot otherwise subsist: For, as we have said already, In omnibus juxta humani institutis, excepta videtur necessitas fissa, quae rem reducit ad merum jus nature: All human constitutions give place to the Law of Nature, in cases of unavoidable necessity. Almost all Nations (faith St. Augustin) are taught by the very voice of Nature, to submit to the will of the Conqueror, rather than to hazard an utter desolation. And therefore, as Herodotus notes, In that Oath, wherewith the Grecians bound themselves to be faithful to the Persians as to the Conqueror, this Salvo was added, Nis plant coeli. Unless they were manifestly forced to the contrary. Thus we read that Anaxilas was deferredly acquired by the Spartans, for delivering up the City Byzantium, being distrested more by famine within, than by the Sword without. And Xenophon tells us, that the Emperor Augustus returned thanks to his Commanders, for their timely surrender of the City Martyropolis, thereby preventing the unnecessary effusion of blood, since it was impossible to defend. Cun fame habitaris virtus recursa, Valorem non colubis with famine, faith Propocius, neither can we expect that Nature should act vigorously, when the wants nourishment. So Cophiulus (in his Epistle to the Emperor Alexius) being straitly besieged in Lausita, Yielding to necessity we must deliver up the Town to those, who not only besiege us, but manifestly starve us, for what can value do against the force of Nature?

Now the reason why, in cases of absolute necessity, every part of the society hath power to defend itself, than the body of that society can have over its parts, is; because that part that is so necessitated, may use that Right which Nature gave it, before that society was instituted, which the whole society cannot: Neither let any man say, that the Right of Empire is in the whole society, as in its subjicet, and therefore may be alienated by it as things held in propriety may; for the Government is indeed in the whole body as in its adequate Subject, (but not dividibly in many bodies) as the Soul is in perfect Bodies. But that necessity that enforces us to flee back to the Original Right of Nature for defence, cannot here have place: For under that Right the free use of Nature is comprehended, as eating, and detaining what is ours, which are natural, but so is not the Right of Alienation, which receiving its authority from humane institution, is from it to receive its bounds.

But as to the Empire over such a place, being a part of the Territory that lies uninhabited and desart, I cannot discern any reason at all, why it may not be alienated either by a free people, or by a King with his peoples consent. For as every part of the people have equally freedom of Will, to have they equally a Right to gain say whatsoever any other would have; but the Territory it self, whether wholly, or in its part, considered, is the peoples Common undivided, and therefore wholly at their dipole; and as to the sovereignty over any part of the people, if, as I have said, it cannot be alienated by the whole body of the people; much less can it be done by a King, who though he have the full power, yet he hath it not fully.

And here I must crave leave to differ from those Civilians, who hold that no part of an Empire can be alienated by a King, unlefs it be for publick profit or out of necessity; unless they understand it in this sense, that where the profit doth equally accrue, both to the whole Nation, and to that part which is to be alienated, the content of both may easily be collected from their silence, though of no long time, which may much more easily be presumed, if there appear likewise a necessity for it: But if either part do manifestly declare against it, there can be no Right to alienate, unless the part be evidently enforced either to separate from the whole, or suffer themselves inevitably to be destroyed.

Under Alienation is deferredly compris'd even Infeudations, under penalty of confiscation for breach of faith, given to the Lord of the Fief; or when the Family is extinct: For even this is a conditional Alienation, wherefore we often see, that as those Alienations, so these Infeudations of Kingdoms which Kings have made without the peoples consent, yea, and the Remission of Homage too, have by many people been made void. Now the people are said to consent, either when the whole body of them do meet to express it, as the Germans and Gauls were wont; or when the several Provinces do it by their Deputies, being thereunto sufficiently authorized. As in the German Empire, the consent of the Princes Electors both by Custom and Covenants, conclude all the orders thereof in any Alienation: for, Whatever we do by another, is reputed our own all; Id facimus quod per alium facimus. So neither can any part of an Empire be mortgaged, without the like consent;
Of the Right of Alienation.

BOOK II.

X.

Inferior Juridications not executable by the King.

Not the peoples patrimony.

That part of the peoples Patrimony (being amongst the ancient Grecians a part of the common Fields) the fruits whereof were designed for the maintenance either of the publick charge of the Common-wealth, or of the Royal dignity, cannot either in the whole, or in any part thereof, be alienated by Kings without the consent of the three States, that is, the Clergy, Nobles, and Commons; because they have not that right to any thing more than to the present profits, no not to the smallest part of it, as I have said.

For, "Quaem unam non est, ejus nec exiguum partem alienare mihi jus est; Of that which is mine, I cannot alienate the smallest part." Yet the people may sooner be precluded to consent by their knowledge and silence, in such small matters than in greater; And the like may be precluded in cases of common profit or danger, concerning the alienation of some parts of the Empire, if it be not of any great moment, for that Patrimony was at first instituted for the good of the Empire.

But many are deceived in that they do not rightly distinguish between the things arising from the Patrimony as its fruits or profits, and the Patrimony itself. As for example, the washing of the banks of a River is patrimonial, but the increment which the Flood produceth is but the fruits and profits of it: so the power and right of raising a Tax is patrimonial, but the money so raised is but the profits of that Right. The right to confisicate is patrimonial, but the Lands confisicated are but the profits of that right.

Those parts of the peoples patrimony, which are so designed as aforesaid, may upon just cause be pawned or mortgaged by Kings, that have full and absolute power, that is, that have power upon occasion to raise new Taxes upon their Subjects: For as Subjects are bound to pay such Taxes, so are they likewise bound to satisfy that, for which any part of their patrimony is for the public good pawned, the redemption whereof is some kind of tribute. For the very patrimony of the people is a kind of pawn given to the King for the payment of the publick debts, and any thing that is thus pawned to me, I also have a right to pawn to another: Yet what hath hitherto been said is of force, unless it be where the Laws of the Land do either enlarge or contract the power either of the Prince or the people.

This also must be observed, That under this Title of Alienation, we comprehend likewise Testaments: For though Testaments, as some other acts also, are belonging to the Civil Law for their form, yet is the matter of it nearly allied to dominion; and it being granted to the Law of Nature. For a man may by Testament give away his Estate, not only fully, but under certain conditions, nor irrevocably only, but with a power to revoke; and yet he may still keep the possesion of what he so gives, with a full right of enjoying it: For a Testament is an Alienation of a mens ESTATE at his death, and revocable till then, and yet reverifying in himself the full possession, and absolute fruition during life. And therefore SELON, in permitting his Citizens to make their Testaments, Made them absolute Lords and Proprietors of what they had. Surely our Estates would be but hoots and fowms unto us, if the power we have in it during life, should be taken away from us at our death. Abraham in pursuance of this Right (had he dyed childless) had left, by his Testament, all his Estate to Eliezer, as we may collect from Gen. 15. 2. And the making of Testaments was of frequent use among the Hebrews, as may appear, Dent. 21. 16. Ecclus. 3. 25. But that in some places it is not permitted to Strangers to make their Wills, is not to be attributed to the Law of Nations, but to the municipal Laws of some Countries, and if I mistake not, enacted in such an Age, when all Strangers were accounted enemies; and therefore amongst the more civilized Nations hath long since been worn out of use.
CHAP. VII.

Of that Right that is acquired by Law, and of Succession from an Intestate.

I. Of the Civil Laws some are unjust, and therefore cannot transfer a Right, as in things shipwrackt.

II. By the Law of Nature, a Right may by gained, in things taken from another for a just debt; and when.

III. How Succession to an Intestate estate doth naturally arise.

IV. Whether by the Law of Nature, any part of the Parents goods be due to their Children, explained by distinction.

V. The Children of the deceased preferred to the Estate before their Parents; and why.

VI. The Original of Representative Succession.

VII. Of Abdication and Exheredation.

VIII. Of the Right of Natural Issue.

IX. Where are no Children, nor Will, nor certain Law extant, the ancient Estate shall return from whence it is descended, and to their Children.

X. But that which was lately gained to the nearest in blood.

XI. The Laws touching Succession are diverse.

XII. How Succession takes place in Patrimonial Kingdoms.

XIII. In Kingdoms Indivisible the first-born to be preferred.

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XXVI. Whether a King may for himself and his Children, renounce his Kingdom.

XXVII. Concerning the Right of Succession, the Judgement, to speak properly, is neither in the King nor People.

XXVIII. A Son born before his Father was King, shall be preferred before him that was postinate.

XXIX. Unless it be otherwise provided by some other Law.

XXX. Whether the elder Brother deceased, his Son be to be preferred before the younger Brother, explained by distinction.

XXXI. Also whether the younger Brother living, be to be preferred before the King's elder Brothers Son.

XXXII. Whether the Kings Brothers Son be to be preferred before the King's Uncle.

XXXIII. Whether the King's Son be to be preferred before the King's Daughter.

XXXIV. Whether the younger Son of a King's Son be to be preferred before the eldest Son of a Daughter.

XXXV. Whether the Daughter of the eldest Son be to be preferred before the younger Son.

XXXVI. Whether the Son of a Sister be to be preferred before the Daughter of a Brother.

XXXVII. Whether the Daughter of an elder Brother be to be preferred before the younger Brother.

Havinc thus shewed what Right may be derived from another by his Act, now we are to treat of the Right that is derived from another by Law; And this is, either by the Law of Nature, or by the voluntary Law of Nations, or from the Civil Law. It was endlefs to treat here of the Civil Law, neither are the main Controversies concerning War thereby determined; and therefore we shall purposely omit it. Yet is it worth our Observation to know, that some of the Civil Laws are apparently unjust; as that which adjudgeth goods Shipwrackt unto the Kings Coffers. For to take away another's Right and Propriety without any preceding cause, that is probable, is a manifest injury. Thus pleads Helen in Eupriptides,

R Wreckt.

I. Some of the Civil Laws unjust.
For what Right, faith Conphantus, can the misfortunes of another create to a King, that be should be enriched by a calamity so much to be pitied. And therefore Dion Phusenous, in an Oration of his concerning Shipwracks, crys out, Autis, O Jupiter, ut lexum captorum tale, ex hominum infortunia; For be it? O Jupiter, from me to take such advantages by other mens misfortunes. And yet such a Right do the Laws of Nations very unjustly give; amongst the English, the Sicilians; And such an ancient Law Saperar mentions to be in force in Greece. Christian King of Denmark, upon the abrogating of this Law, complained, That he lost an hundred thousand Crowns yearly. Nicetus (speaking of this Law, calls it a Cutoff so barbarous as is not to be named. What then was Bodines meaning to defend this Law? He, namely, who reprehended Papinian for chusing rather to dye, than to act against his own Conscience.

Propriety or Dominion being introduced, it follows, by the Law of Nature, That things are alienable two ways: First, By commutation; which consists in the making up of that Right which I want, whereby the balance of just ice may be made even: or Secondly, By Succession. Now Alienation by way of Commutation or Expleion is when for something that is, or ought to be mine, which I cannot receive in kind, I take from him that detains it or somewhat in lieu thereof, that is, some other thing of equal value. Thus Irenaeus excuseth the Hebreu for robbing the Egyptians of their goods, Which faith, he, they might take and keep in compensation of their labour. Now that Dominon may be thus transferred, is easily proved from the end, which in moral things is the best proof. For how otherwise can I be paid to receive my full Right, unless I become the right owner of it? Seeing that it is not the bare detention, but the full power to use and dispole of it at my pleasure, that makes the Scales of Justice even. An ancient example of this we have in Diodorus, where Hesron made in lieu of those things which being promised to his Daughter by Jxen, but not given, took away his Horfes. For Expleitive Justice, when it cannot recover what is the fame, endeavours to get the value of it, which in a moral estimation is the fame. By the Civil Law no man, we know, can do himself Right: Nay, if any man shall have his hands take away from another, though but what is his due, it shall be imputed unto him as Rapine, and in some Countries, he shall lose his debt. And although the Civil Law did not diefly forbid this, yet from the very inftitution of publick Tribunals, it may easily be concluded to be unlawful. But where there are not publick Courts to appeal unto (as on the Seas and in Defarts) there the Law of Nature must be our guide. So it should sometimes, when the Laws ceafe but for the present, that is, if the debt can never be got otherwise: As, if the Debtor be ready to fly the County before the Courts can be open; in which cafe the Creditor may lawfully have recourse to the Law of Nature: Yet fo, that the Judgement of the Court must afterwards be expected, before the Right of Propriety can be attuned, as in the cafe of Reprizals; as shall be said hereafter. But yet, if the Right be certain, and it is also morally as certain, That a man cannot by a Judge receive satisfaction for want of due proof, the beft opinion is, That the Law concerning Judgements cefresh, and that a man may have recourse to the ancient Law of Nations.

Domion being once introduced, that which naturally guides the Succession to the estate of a perfon dying intestate, setting aside the Civil Law, is our conjecture at the Will of the deceased. For seeing that the force of Dominon is such, that it may be transferred at the will of the right owner, unto another: Therefore in cafe a man dyes pofleft of an estate, leaving nothing to teftifie his mind after his death; because it is not credible that he would leave it to him that could next catch it, therefore shall it succed to him to whom it is probable he would have left it, had he lived to have declared it. Deiintorum voluntatem intellecte, per juve officio, filius Junior; To have understood the Will of the deceased, is sufficient to create a Right. Now to the dead this favour is indulged, That in cafes that are doubtful, it is presupposed, That every man would do that which is most just and honest; whereof in the first place is the payment of his just debts, and in the next, that which, though not due, yet is most agreeable to our duty: And therefore what is committed to a man true may be restored, faith Paulus, (the perfon dying Intestate that trufled it) to those that succed him, because it may be believed, That his Will was freely to leave the lawful inheritance unto them.

It is much controverted by Lawyers, Whether Parents may be paid to owe their children Aliment: Some of them hold it to be agreeable to Natural Reason, but deny it to be a Debt. But we think it fit here to distinguih of the word Debt, which may be taken either strictly, for that which by Commutative Justice we are obliged to do; or largely, for that which cannot with honour or honestly be left undone, as being a duty arizing from
from another spring, but not from that of Justice. Now Aliment is due to Children (if Humane Laws do not otherwise determine of it) in this looser fene. In which, I conceive, that of Val. Maximus is to be understood, Our Parents by nourishing us, have laid this obligation upon us to nourish our Children. And that also of Plutarch, in that most elegant Oration of his, concerning the Love of Parents towards their Children, Liberis hodiernis, in his debits, expressis; Our Children look for our estates, as due unto them after our death. So great was the Equity of this, That St. Augustine would not admit that the goods of such as had exorbitante their own Children, should be received by the Church. And as Prosopis in his Persian Wars obserueth, Though Humane Laws do in other things extremely differ one from another, yet all Nations, as Romans as Barbarians, in this agree, That Children should succeed to their Parents, as the right owners of what they leave. Again, Qui formam dat, dat quia ad formam sunt necessaria, He that giveth the form, giveth necessity to that form, faid Aristotle. Therefore he that giveth man his existence, ought, as much as in himself lies, to provide for him all things necessaries for a Natural and Social life: for hereunto he was born. There needs no Law to bind us to this duty; for all other creatures, even by Natures infirmitie, do feed their young: As Pliny obserueth of Swallows, That with great equity they feed their little ones by turns; (Summa aptate alternante ejusmodi.) Hence it is, that the Ancient Civilians do refcr, the Education of Children to the Law of Nature. And Euclidines comprehends all Creatures under one and the fame Law, Which, faith he, is common as well to men among themselves, as to them, with all other fensible Creatures. For that which Natural Infirmitie commands to them, the fame doth Reafon prescribe unto us. Of such force is Natural affection, that it easily persuades us to nourishe our Children, faith Justinian. Nature is an Indulgent Mistress to all living Creatures, equally infructifying them how to conferve not only themselves, but those that are born of them; that is, by this fucceffive Charity the may afpire to make her felf immortal. Quintilius brings in the Decefe in the Son claiming a Portion of his Inheritance by the Law of Nations. And Saluff condemneth that Testament as impious and unnatural, by which the Son is excluded from its part of the Inheritance. And becaufe this is a debt that we owe to Nature, therefore is the Mother bound to nourish the Child that hath no certain Father. And though the Roman Laws made no provision for Children ex dammate legis et Concubinat, that were illegitimate; and that by Salus Laws it was provided, That no man should leave any thing to his Natural Issue; yet do the Canons of our Religion correct the feverity of these Laws, by teaching us, That our Children, however begotten by us, fhould be a part of our care; and that in cafe it be needfull, we ought to leave them enough to prefervc that life which we gave them: but beyond neceflaries, is no man bound by the Law of Nature to provide for them. Neither are we bound to nourish our Sons only, but those alto that proceed from them, yea, even to the third generation, according to Justinian, and that for humanity fake: Neither should our Charity refce here, but it fhould extend itfelf even unto tho whom we掎ve out of our Loins, and are born unto us by strange women, if they cannot otherwise be maintained.

Children ought also to nourish their Parents; not only in obedience to many whom Laws, but in common gratitude, like the Storks, who when their Parents are spent with age, feed them, and being faint, receive them on their backs, and carry them from place to place: And therefore in nourishing tho, who when we were Children fed us, we are Proverbially said, To imitate the Stork. Solon is highly commended for setting a brand of infamy upon tho, that did not: Yet is not this fo ordinary as that which we have said of Children. Because Children when they are born, bring nothing into the world with them whereby to live; and have probably a longer time to live here than their Parents have. And as honour and obedience is properly due to Parents, and not to Children: So is Sufferation due rather to Children than to Parents: And thus is Lucian to be understood, when he tells us, That it is more agreeable to the dictates of Nature, for Parents to love their Children, than for Children their Parents. And that also of Aristotle, That which begot, is always better afcended to the thing begotten, than that which is begotten, can be to the begetter: For that is properly said to be our own, which derives its being from us. Whence it comes, That without the favour of the Civil Law, the first Succesion to the goods of the Parents is tranfmitted to their Children; it being presumed, That next after them, they would that those born of them (as being part of their own body) should be plentifully supplied with all things, not only neceffary for life, but for a more honest and comfortable livelihood. Insomuch, that were all humane Laws after, yet, as Paulus the Lawyer obserueth, would natural Reason, which as it were a fluent Law, adjudge the Fathers Inheritance unto his Children, and invest them in it, as their due, by an undoubted Succesion. But yet, as Papinianus notes, cannot Parents claim the effates of their Children, by the fame Right as Children do the Inheritance of their Parents: For Parents are admitted to their Children goods merely out of Commiffion; but Children to the effate of their Parents by the common vote, that is, both...
of Nature and of their Parents. Philo, in his third Book of the life of Mofes, gives this Reason why Mofes made no provision for Parents out of their Childrens Estate, Because seeing that the Law of Nature did provide that Children should succeed their Parents in their Estate, and not Parents their Children, therefore did Mofes pass over in silence, what was contrary to the defects of all Parents, and might prove unlucky. Hence we may observe, That the Inheritance of Parents descends upon their Children, by a two-fold Right; partly, as a meet debt of Nature; and partly, out of a Natural Consequence, That it is the Will of their Parents, that their own Children should be best provided for. Sanguinis honorum veloquis, fath Val. Max. of Quintus Hortensius, His honour be bequeathed to his Blood. For though he detected the wicked life of his Son, yet dying, No ordine naturae confundens, non negavit, sed filiam hæredem scriptis; To preserve the order of Nature, he made his Son, and not his Nephews, heir to his Estate. Thinking it enough, that he had declared his dislike of his Sons ill manners whilst he lived. And therefore dying, he left him the honour due to his Blood. The like he records of Eutius, who caused his own Son to be apprehended for conspiring his death, did not only forbear to prosecute him whilst he lived, but dying, Dominium omnium esse volunt, quem generat hæredem institutis, non quern suaret. expressis: Made him heir of all he had, regarding his Birth and Blood, and not his Crimes. And to this purpose is that of St. Paul, Children do not lay up for their Parents, but Parents for their Children.

Now because it is thus natural and ordinary for Parents to take care of their Childrens Education, therefore whilst they live, there lies no obligation upon the Grand Parents to give them maintenance: Yet in case the Father or the Mother dye, or be otherwise disabled, then it is a duty, which in all equity the Parents of the deceased Son or Daughter are obliged unto, to see their Nephews and Nieces virtuously brought up. And by the same reason, is the same duty incumbent on the Parents of more remote degrees if these fail. And from hence ariseth the Right of the Nephew to inherit the Estate, instead of a deceased Son, as Ophius speaks. Which gave occasion to that Hebrew saying, Filius etiam in Sepulchro succedet; That the Son succeeds, though in his Grave. Because Fili filiorum suos guisipii; The Sons of that dead Son, are reputed Sons. And as Nosadesius speaks, Shall fill up the vacant place of their dead Father. Jutinian thought nothing more unreasonable than this, That the Nephew should succeed instead of the deceased Father, in the Estate of his Grand Father in case he dyed Intestate. And this kind of Vice succession, our Modern Civilians do affectedly call Representative; when the Sons claim an Estate, by representing the person of their Father being dead. And that manner of Right was approved of amongst the Hebrews, the division of the Land of Canaan amongst the Children of Israel, doth sufficiently demonstrate. As our Sons and Daughters are nearest unto us in blood, so are those who are born of either of them, as Demonstrates observeth in his Oration against Macroarius.

What we have hitherto said concerning the Right of Succession, arising from our Conjectures at the Will of the Intestate, is of force, if there appear no certain sign, that he was otherwise minded. Such in the first place was among the Greeks an Abdication, or a manifest renouncing, or calling off of the peril claiming; And among the Romans an open disinheriting of him; yet so, that if that peril did not by his crime deserve to be put to death, he was to be allowed sufficient to sustain Nature, for the Reasons aforesaid.

And here we may add another exception to this general Rule, that is, If it do not sufficiently appear that such a Son or Daughter was begotten by him: But yet we know that of such matters of fact there can be no certain knowledge: But of such acts as are publicly done before men, there may be some certainty upon the Testimony of such as beheld them. In which sense the Mother may be certain that the Child is hers, by those who were present at its Birth and Education; but thus certain cannot a Father be. Which Homer first, and after him Menander thus intimates:

Know directly no man can
From what stock himself first sprang.

And so in another place he thus distinguisheth between the Parents;

Fathers do love their Children, Mothers dote:
She knows them hers, but this he takes by vote.

Therefore some way was thought fit to be found, whereby it might probably appear, who the Father of every Child was: And this was Marriage taken in its Natural terms, that is, for such a cohabitation, as placeth the woman under the custody or safeguard of the man. But whether by this, or some other way, the true Father of the Child be known,
known, or that any man doth own the Child as his; by the Law of Nature, that Child, as well as that born in Marriage shall inherit. Neither is this strange, seeing that we see more strangers (being adopted for Sons) to succeed in the Inheritance, only by conjurethe at the owners will. And the Nephew instead of the Father; as old Jacob adopted Ephraim and Manasseh into the number of his Sons, in the stead of their Father Joseph. But our Natural life is differed from our Legitimate by Law only. So Ewripide,

Bastards, no less than those in Wedlock born, are ours, although by Laws they’re left forlorn.

And yet may those also be adopted Sons, if the Laws forbid not, as it was anciently permitted among the Romans, by the Law of Aemilius: But afterwards in favour to lawful Marriage, there was a more difficult way found, to make Bastards equal to such as were Legitimate, namely, by the free offer of the Court (when they say cause) or by the subficient Marriage of the Mother of the Child. Thus did old Jacob adopt his Natural Son s, making them equal to his Legitimate, and giving them equal shares in his Inheritance. But the contrary may sometimes happen, not only by the prohibition of the Law, but even by agreement, when it is agreed on both parties before, That they that are to be born by that Wedlock shall receive only Aliment, but no part of the Ancient Inheritance. And such a Marriage the Hebrews call Concupiscible, although made with a Free-woman: Such was that of Abraham with Keturah, called therefore his Concubine, Gen. 25. 6. whole Children, together with Ishmael the Son of Agar his Bond-maid, are said to have received gifts, that is, Legacies; but no part of the Ancient Inheritance. So it was anciently among the Mexicans, who gave all to the eldest Son, but nothing to the rest but sufficiency only: And not much better are second Marriages in Brabant, where the Children by the second Venter, have no Propriety in the Estate which the Father held at the death of his former Wife. The like Law we find among the ancient Burgundians.

If a man dye Childless, and withal Intestate, on whom the Succeedion should descend, is not easily to be determined. There being no one thing wherein the Laws do more differ. All which differences may notwithstanding be reduced under two Heads, whereof the one hath respect to the nearest of kin, the other to the severer Spring-heads from whence it descended: That which came by the Father, to his Relations; and that which came by the Mother, to hers. But here we must distinguish between the Ancient Inheritance, and that lately purchased: That of Plato must be understood of the former, Ego Legum conditor, &c. I being a Law giver, faith he, do ordain, That neither your Persons nor Patrimonial Estates are in your own power fully, but your stock and lineage have a Right thereunto; as well they that now are, as they that are to come. Whereby it seems that Plato would have καθοριζων αυτων, the Ancient Inheritance preferred intire for that Tribe or Kindred by which it came: Which I would not have to be understood, as though it were not naturally lawful to dispose of any goods that defend unto us, from either Parents or Ancestors otherwise. (For sometimes to relieve the wants of a Friend, who hath well deserved of us, is not only commendable, but necessary.) But (that in a cafe ambiguous) it may appear what we ought to believe the will of the Intestate was. For we take it as granted, That he that dies hath at his death a full Right to dispose of his Estate. But since it is impossible for him to retain this Right being dead, and that it may be presumed, That he would not altogether lose that Right, whereby he might gratifie his Friends: It concerns us to enquire in what order this benefit should naturally descend. Wherein that of Aristo is most rational, Potius est gratiam referre ei qui beneficet quam amico confcrere beneficium; That it is better to return thanks to our Benefactor, than to oblige new Friends. For as Cicero faith truly, There is no duty so necessary as that of Gratitude: For since Liberty hath but two Branches, whereof one is to do good, the other to repay good; the former we may do if we will, but the latter we must do if we would be benevolent, and can do it without injuring any. So St. Ambrose, It becomes every man to have a greater respect unto him from whom we have received a Countesse, than unto others. And premittus after, What can be more against our duty, than not to return what we have received? Now our Gratitude is express either to the living or to the dead, as Lysias observes in his Funeral Oration. It is shewed in doing good to their Children, being naturally the surviving parts of them, and unto whom their parents, if living, would have been most beneficent. In me conferes quicquid in liberos meos contuleris, faith the Father man, in Procopius, who was about to adventure his life against a Dog-fish, to gain a very great Pearl for the Emperor Cofro, That is the best Gratitude that is shewed to the dead? For what, O Emperor, thou shalt confer on my Children, if I perish, thou bestowest upon me. And according to this rule did they walk who framed the Justinian Laws, in that question concerning whole and half Brothers, and in that concerning Cousins in Blood, and in some others. Brothers, faith Aristo, do love each
each other, being born of the same Parents: Or tus communis ipfos quasi codem facit; One common blood whereof they are made, makes them almost one and the same. Whence fter is quasi fere alter, A Brother is but almost another, or as one cast in the same mould. For as the highest bond of Love is deservedly that which Children owe their Parents, from whom they receive the most and the greatest benefits, as their lives and livelihoods: So the next is that of Brethren to each other, as having received the same benefits together from the same Parents. And therefore for Brethren dying Childless and Intestate, to succeed one another, is (according to justice) the Common Right of Nations. But in case he, from whom the goods last descended, be not to be found, nor any of his Children; it remains that the thanks be paid to them, to whom, though not to much, yet next after him they are not withstanding due; namely, to the Parents of the next degree above him, and his Children. Especially, seeing by this means it may be continued between the Kinmen, both of him whole inheritance it was, and of him from whom the said goods first descended. So the same Arbitrate, Cousin German, and the rest of our Kindreds, are linked together by their Parents, as being born of one common stock; yet so, as some are more nearly allied than others, according to their respective births. Thus by the Law of Moses, the Unkle succeeded after the Brothers, as being nearer unto the first Owner, than the Brothers Children, Num. 27. 10, 11.

But as to that part of the estate that is but lately acquired, because there lies no obligation of thankfulness to our Ancestors for them, it remains that the succession should pass to him, that was dearest to the person deceased, which is presumed to be his nearest Kinfman, who is as it were his own Flfii, Prov. 11. 17. or his Brother, Deut. 15. 11. for our Love to our kindred should be proportionable to the nearness they are unto us in blood, and so that after our Parents, they are left to be provided for, who are by nature in the nearest relation unto them. And therefore among the Greeks, as Iesus tells us, The Goods of the deceased, did always descend unto the next of kin. Whereunto he adds, What can be more just, than that the estate that was a kinfman, should descend unto his kinfman? How well would this confirm Human Society, that faith Cicero, and promote the honour of private Families, if the nearer any man were allied unto us, so much the more benign and bountiful we would be unto him? Next unto our children, the same Cicero placeth our loving kindred, who as they are nearest, so ought they to be dearest unto us; and to provide for these especially, is a debt that we owe them, not by Commutative Justice, but by Distributive, as being most worthy, for the honour that is due unto our own blood. And therefore the same Cicero, speaking elsewhere of that natural affection which every man bears to his own Relations, tells us, That from thence arises the Testaments and Legacies of dying men: It being much more equitable, to leave our estates to our own kindred, than unto strangers. This is the Charity that is most acceptable to God, as Iesus tells us, To feed the hungry, to clothe the naked, and that we hide not our felves from our own flesh. And St. Ambrose highly commends that liberality that is thrown to our brethren and kindreds, as being next in blood to us. Now that succession, which thus descends from a person dying Intestate, is but as it were a silent Testament, which the Laws of Nature and Nations make Authentick, by guefling at the will of the deceased. Thus Quinctian also, Next unto them who claim a Right by the Testators Testament, are his kindred in case he dye Intestate and Childless: not because the Goods of the deceased are in Justice due unto them, but because being defeated, and as it were left without any certain Owner, none can pretend so much right to them as they, being the next of kin. And what hath been said of Goods newly purchased by the person dying Intestate, That they naturally descend to his nearest Relation; may as truly be said of such Goods as descend unto him from his Father or Grand-father, in case neither they, from whom they descended, nor any of their children do survive, to whom in point of Gratitude they should return.

Now though what we have here said, be most agreeable to Natural Consequences, yet are they not by the Law of Nature necessary: wherefore, from divers causes moving mens wills, successions do usually vary, according to the diversity of Agreements, Laws or Customs rationally grounded; some whereof will admit of substitution in some degrees; others not. The Ancient Germans were altogether ignorant of that kind of succession which we call Representative, even among their children; as that the Eldelst Brothers Son should succeed in the room of his deceased Father: which Right first took place in France by an Edict of Childers; and was first introduced into those parts beyond the Elwine by Otbo. So the Ancient Scots left Right of succession went according to the sole proximity in blood, and not by substitution, it being destroyed by the King of England, who was chosen as Arbitr, to decide that difference. In some places regard is had to the first Purchaser; in others, this is neglected. There are some Countries, where the first-born carries away the greatest part of the estate, as among the Hebrews; but in some others, all the Children share alike. In some the kindred by the Fathers side, only succeed; in others, those by the Mothers, have an equal portion. In some, regard is had to
to the Sex; in others, none at all. In some, the kinsfolks in the next degree only are admitted; in others, they admit those in degrees more remote. To trace all, would be tedious; neither is it my purpose so to do. But this we must grant, That where the deceased hath declared nothing of his Will, it must be presumed, that the Estate should pass, as the Law or Customs of the place doth order it; but not so much by the power of the Empire, as by the force of this Conjecture, which also takes place against those in whom the Supreme Power resides. For it is very probable, that what they by their Laws command, or by their Customs approve of in their Subjects, the same in their own affairs, they hold to be most Equitable, so as no great damage ariseth to them by it.

As concerning the Succession to Kingdoms, we must distinguish between those that are Patrimonial, and in a full and absolute manner poffeffed, and those that are held in such a manner as paffeflet the People. The former fort may be divided even between the Sons and Daughters; as in the Kingdoms of Egypt, as Lucan testifies,

— Nullo discrimine Sexus
Reginam scit ferre Pharos.

— In Egypt's Throne
Difference of Sex there is none.

The like doth Tacitus record of the British Empire. In Asia after Semiramis, many Women were permitted to Reign, faith Arianus; as Nicerius in Babylon, Artemisias in Haliacarnassus, and Tamyris amongst the Scythians: yea, and such Kingdoms may be divided, as in Asia, all the Brothers Reign together, though one only hath a principal Right to the Crown; which Customs the Empres Irene would without any precedent have introduced into the Constantinopolitan Empire in the Reign of Andronicus Paladoncos, as Gregoras notes, That, faith he, which is most strange and to be admired, was, That she was not willing, that any one should obtain the whole, according to the Ancient Customs of that Empire, but according to the Examples of the Western Princes, the Cities and Regions should be divided amongst her Sons, that so each of them might hold his Kingdom as his Patrony, just as the effates of private men are divided among their children; so that each part of the Empire should descend perpetually to each of her Sons, and to their Heirs after them. For being her self of a Western Extravagant, she endeavourd to introduce their Customs without example. Neither are adopted Sons les capable of Succession, by giving as the Will of the Interdict, than true Sons: Thus did Hyllos the Son of Hercules succeed to Aegyptus King of the Locrians by Adoption; as also did Molochus the Father in the Kingdom of Epirus, by the Judgement of his Father Pyrrhus, having no lawful Issue. The Tartars make no difference between Bavards and them that are Legitimate. So Herodotus of the Persians, Mos est illis ut Nobis regnum dom legimus aliquis repepitur; Who admitt of Bavards, till one that is legitimate may be found. And we read in Jusitine of a Treaty between King Aneas and Philip concerning the Adopting of Philip to succeed him in the Kingdom of Scythia. Jugurtha, though a Bavard, yet succeeded in the Kingdom of Numidia by Adoption. The like we read of those Kingdoms which the Gaths and Lombards conquered, that the Succession often pass'd by Adoption. Nay, the Succession to the Kingdom shall pass to the nearest of kin to him that last possesst it, though he were nothing of kin to the first King. If any such Succession be in force in those places: Thus did Mithridates in Jusitine plead, That Papalagonia became his Fathers Inheritance, by the death of all his then living Kings.

But in cases express caution is given, that the Kingdom shall not be divided, and yet it be not express what shall succeed, then the Eldest, whether Son or Daughter, shall enjoy the Kingdom. So faith Nicetas Comites, Nature indeed observing her own order, gives the greatest honour to the first-born; But God hath a Prerogative above Nature, and alfo not always by her order. And speaking of Isaccus, he faith, That by his birth-right, the succession to the Kingdom was his. The like is said of Herocles in Josaphus. In the Talmud, unnder the Title of Kings, we read, That be that hath the best right to the estate of inheritance, hath also the best title to the possession of a Kingdom, and therefore the eldest Son is always preferred before the younger. Herodotus makes it the custom of all Nations for the eldest Son to succeed in his Fathers Throne. And in another place, he terms it, the Law of Kingdoms. Livy makes mention of two Brethren, Allobrogi, contending for a Kingdom, whereof the younger had the worst Title, but the greatest Power. Of all Darius his Sons, Artabazones being the first-born claimed the Kingdom as his birth-right: Quod Jus & ordo nafcendi & Naturæ ipfa gentibus dedit; Which Rights, faith Jusitine, both the order of birth, and Nature it self hath given to Nations: which in another place he calls, the Law of Nations. As Livy also faith, It is a priviledge due by the order both of Age and Nature; yet must this be understood with this restriction, unlefs the Father by his Testament do otherwise dispose.

XI. How successi–

How succession to Kingdoms patrimonial ought to be guided. Daughters capable to succeed in Egypt and Britain.
dispute of the succession, as Psalmony in Justin, did his kingdom to his eldest son. But yet he that shall thus succeed, is bound to gratifie his Brethren for their shares with all respect and honour, if (and as far forth as) he shall be able to do it.

But those Kingdoms that by the Peoples free content are made hereditary, may by gulling at the will of the people be transferred. Now, because it may easily be preferred, that the people will give their content to that which is most expedient; therefore in the first place it will follow, That unless some Law or Custome do otherwise determine, (as in many it hath and may do) the Kingdom shall fland entire and undivided; because whilst so, it will be the better able, both to defend it itself, and to confer the people in peace and unity. Of this opinion was Justin, Firmius Flaccus ut quae restatur, quam si布朗inie inter filios divideretur, arbitrantur; They judged that the Empire would be more firm, being intirely possess by one, than it could possibly be, di

Again, it being granted, that the peoples content is easily gained to what shall be most expedient, it will in the next place follow, That the succession should descend from the first King in a right line: Because that Family was then eldted, as being thought the most Noble; which Family being extinct, the Kingdom doth return back to the people. Thus Curtius adviseth *, That the Sovereign Power be strongly sted to one Royal Family, which ought to claim by an hereditary Right. For the people being so accustomed, will not only reverence his person, but will have the very name of their King in great esteem: And therefore no man ought to usurp that dignity, but he that was born unto it.

Thirdly, it will thence likewise follow, That none should be admitted to succeed in the Royal Throne, but he that is born Legitimate: Not the Natural Sons, because they are subject to be reproach, to whole Mother the Father did never vouchsafe the honor of marriage. And therefore of such, there can be no certainty, who was the Father. But in the successio to Crowns, the people ought to have the greatest assurance that in such a case can be given to avoid Controversies. For which cause it was, that the Macedonians preferred Demetrius the younger Son to the Throne, rather than Perseus the elder, because he was born in lawful Wedlock. Not Sons by Adoption, because the people are apt to conceive greater hopes, and to have their Kings in greater esteem and veneration, when they know them to be descended from a Royal Stock.

Eft in Juveneis, est in equis parum
Virtus.

In Horse and Oxe we may defery
The Syre's Generosity.

XIV. A Kingdom by the peoples content hereditary, if in doubt, is presumed to be indivisible. Lib. 21. A Kingdom united is stronger, than when divided.

XV. The succession not to last beyond the line of the first King. Lib. 8.

XVI. Natural Illuc not concern-ed in it.

Fourthly, That of those that have equal Title to the Inheritance, either as being in the same degree, or as succeeding to their Parents who were in the same degree, the Male Illuc be preferred before the Female; because Men are fitter for War, and to administer other Regal duties, than Women can be.

Fifthly, That of Sons, or of Daughters, if there be no Sons, the elder be preferred before the younger; because it may easily be believed, that as he is of more years, so he either then is, or may sooner arrive to be of founder Judgement than the younger. So Cyrus in Xenophon, Imperium relinquuo majori Natu; I bequeath my Kingdom to my Eldest Son, as being more of experience, and consequently best knowing how to govern. And because our green years will sooner ripen, than our Sex change; therefore the prerogative of our Sex is much to be preferred, before the privilege of our Age. Wherefore Herodotus where he tells us, that Perses the Son of Andromede the Sifter of Cepheus did succeed Cepheus in his Kingdom, gives this as the reason, because Cepheus had no Male Children. And Diodorus affigns the same reason, why Tuthras left the Kingdom of Mysia unto his Daughter Argiope, Because as to Male Illuc he was childless. And Justin tells us, That the Empire of Medes did of right belong to the Daughter of Ages, because Ages had no Son. So doth Cyaxares in Xenophon, declare his Daughter Heires to the Median Empire: For, faith he, I have no Son that is legitimate. So Virgil concerning King Latinus,

He had no Son, no Illuc Male was left,
In prime of youth, Both being of Life bereft;
And by one Daughter this vast State possis.

Homer discoursing of the Kingdom of Crete, doth very wisely allign the reason why in successions the Elder is commonly preferred before the younger, namely, first for their priority of Age; and secondly, for their greater knowledge and experience. Zosimus also mentions
mentions a Persian Law, which gave their Empire to their Kings eldest Son. Thus did Perian and succeed his Father in the Kingdom of Corinba by order of Birth, as Damasiae testifyes. Whence we are given to understand, that although the Children of deceased Parents in some degrees from them, may succeed in the room of their Parents; yet is it to be understood with this Provifo, That they are as capable as the rest, which Baffards are not. Provided also, That of such as are capable, regard be had first to their Sex, and then to their Age; for the qualities of Sex and Age (as they are in this case by the people consider'd) are so adherent to their persons, that they cannot be plutck a funder.

But here it may be demanded, Whether a Kingdom thus conveyed, be a part of an Inheritance: whereunto the most probable Answer is, That it is a kind of an Inheritance, yet separate from that of other Goods. And therefore Innocent the Third thought that the succefsion to such a Kingdom might be loft, if he who was to succeefs, did not fulfil the left Will of the deceased. Such peculiar and separate Inheritance, we may fee in some Fee-Farms and Copyholds, (which were originally given for the melanorating of Lands barren and defart, under some small Rent, which were not to return back to the Donor.) The like may be seen in the Rights of Patronages and Royalties. Whence it follows, That a Kingdom may belong to him, who if he will, may be heir to the Goods; yet fo, that if he will, he may also enjoy the Kingdom, and not inherit the Goods, nor subject himself to the charge that attends them. Now the reason hereof is, because it is probable, that the Kingdom by the peoples content, should be fetled on the King, in the best manner of Right that could be: Neither did they much regard, whether he would accept of the Inheritance or not, since it was not for this, that they made choice of a hereditary order, but that the Title to the Kingdom might be clear; and that their Kings being extracted from a Royal Stem, might attract the more reverence from the people, who were apt from their High Birth and Princely Education, to conceive the greater hopes of their Heroick Vertues; and that the Prince in possession, might receive the greater encouragement to be carefull of the Kingdom, and with the greater Courage and Magnanimity to defend it; as knowing he was to leave it to fuch, as were either in gratitude or love most endeavoured unto him.

But where the cullome of succefsion to Lands absolutely free, and to Lands held from another is diverfe, if the Kingdom be not held of another, or was not at first certainly held, (although it do appear, that homage hath been since done for it) yet shall the succefsion, by the Law go in fuch manner, as the succefsion of Free-hold Lands went, at fuch time when that Kingdom was at the firit Inftituted.

But in fuch Kingdoms as were at first given to be held from another, as being the chief Lord of it, the manner of succefsion shall by the Law be fuch as the succeffion to Lands held in Fee-Farm within that Kingdom was at fuch time as the Inveftiture into that Kingdom was at first given; and that not always according to that Law of the Lombards which we have prescrib'd. For the Gothis, Vandalis, Alamains, French, Burgundians, English, Saxons and all the German Nations, which have by War polleft themfelves of the belt parts of the Roman Empire, have every one of them their own Laws and Cufioms, concerning things held in Fee, as well as the Lombards.

But there is another kind of succeffion much used in some Kingdoms, not hereditary, but as they call it, lineal; wherein is observ'd not that Right which is called Representative, but a Right to tran ftit the future succeffion, as though it were already convey'd, the Law, namely, out of an hope, (which naturally and of it fell worketh nothing) raising a certain true Right, namely, such a Right as ariseth from a Conditional Stipulation, which at prefent gives only an hope, that it will be due, which very hope they tranmit unto the Children springing from the Loins of the first King, but in an order that is certain; so that in the firft place, the Children of the laft poffelfor of the firft degree, as well of thofe that live, as of thofe that are to be admitted, with regard had as well among the living as the dead, to the Sex firft, and then to the Age. But if this Right depend on the deceas'd, then this Right shall pafs to fuch as are defended from them: amongst equals always observing the like prerogative of Sex, and then of Age, and the tranmitting of the Right of the dead upon the living, and of the living upon the dead. And in case their children fail, it depends unto thofe who are, or if they lived should have been, by the like tranmitting next unto him; the fame distinction of Sex and Age among equals, being always observed in the firit Line; fo that no tran fition by reafon of Sex or Age should be made from one Line to another, fo long as they remain of the firft Line, of what Sex or Age foever. And consequently the Daughter of a Son, shall be preferred before the Son of a Daughter, and the Daughter of a Brother, before the Son of a Sister; fo the Son of an elder Brother, before the younger Brother. This is the order of succeffion in the Kingdom of Caffile, and of Normay (as Pantanen tells us in his Danish Hif tory:) and fuch is the succeffion in many Dutchies, Counties
Of Succession to Kingdoms.

This is the succession of the Kingdom of England.

XXIII.
The lineal succession of the Males only. 
Agnatic succession.

XXIV.
A succession that always reposes the proximity to the first King.

Lib. 16.

Lib. 29.

P. 2nd. 4.

XXV.
Whether the Son may be so exheredated, that he shall not succeed in his Fathers Kingdom.

He may, if the Kingdom be Patrimonial.

And Baroniess that are held by Homage or Fealty to the chief Lord. As in the Counties of Artois, Champagn, Tolose and Brittany: This was the order of succession prescribed unto the Duchy of Mannus by the Emperor Sigismund, Anno 1432. and by Charles the Fifth Emperor and King of Spain, to Philip the Second in his Kingdoms and Principalties. But the proof of this Lineal Succession, though there were no Law or Example to guide us, may be taken from the order that is observed in Publick Assemblies. For if in that order, regard be had to lineal defeants, it will be a sign that the hopes conceived of the children of the deceased, was by Law quickened into a Just Right, so that it may well pass from the dead to the living. This is that Lineal Cognatical successio, wherein women, and those that are born of them, are not excluded, but only post-pot’d in the same line. So that recourse is had unto them, in case the Males that are nearer, or that those born from Males in an equal line should fail. The ground whereof, as it differs from an hereditary succe, is the hopes which the people conceive of them who are nearest related to the Prince in possession, and who have the justest hopes to succeed him, that they have Educations answerable to their high birth and hopes; such are the Children of those Parents, who had they lived, must have succeeded.

There is likewise another lineal succession of Males only which is called Agnatical, which differs from the Cognatical, in that it excludes Females, and admits only of Males; which, from the Kingdom of France takes its rife, and is therefore called the French succession. Though the Kingdom of Israel seems to have been thus fetled, 2 Chron. 13. 5. And the chief reaon of this, is to debar Strangers from the Crown, by marrying the Kings Daughters. In both these lineal succedions all are admitted that are any ways allied, though in degrees never so remote from the last possessor, whilst they can derive themselves from the first King. And in some places where the Agnatical Succession is deficient, recourse is had to the Cognatical. Nay, and this latter is sometimes preferred before the former; as in Ethiopia, where the Kings Sifers Son did always succeed him; which Rede records also of the Fris, where the kindred of the women were preferred to the succession. The like we read of the Indians; So Tacitus of the Germans, That their Kings gave the greatest honour to their Sifers Son, as being nearest in blood to them.

Other manner of succedions may be introduced, either by the people, or at the pleasure of him, who holds the Kingdom in a patrimonial right, so that he may alienate it. For he may so settle the succession, that they that are next to himself at all times, may be preferred before others; as it was ancintly among the Numidians, whose for the like cause, the Unkle did succeed in the Kingdom, before the Children of the last King. This Custom was introduced in Africa by the Teltament of Gizzierick, wherein amongst many other things, he chargeth his Vandals, That they should admit of him only into the Throne, that should at any time nearest unto himself, in a right Masculine line, and of them shall the eldest, and then the next in order, whereby he is regarded not the present possessor, but the first Acquisitor: Which order, whether Gizziericks himself learnt from the Africans, among whom it had been long observ’d; or whether they learnt it from some of our Northern Nations, is a question. The like was of old in use among the happy Arabians, as may be gathered out of Strabo. And the later Historians report the fame of Tunridis Cerimefius: Neither is it so long since the Kings of Fife, and Morocco did the like. Livy speaking of Magyris, saith, That whilst he made War in Spain for the Carthaginians, his Father dying, the Kingdom fell according to the custom of the Numidians unto Defalces the deceased Kings Brother. The fame Custome is in force throughout all Mauritania, as Marianates: and in the Kingdom of Mexico and Peru, as the Histories of those parts record. Now the fame if in doubt, is to be observed in things committed to trust, if it be left to the Family. And this agrees well with the Roman Laws, though some Interpreters do wrest it otherwise. These things premised, it will be no hard matter to resolve all Controversies which do arise, concerning the Right of Kingdoms, which the different opinions of Lawyers have made so intricate.

And in the first place, this Question ariseth, Whether a Father may exheredate his Son, so that he shall not succeed in his Kingdom? Where we must distinguish between Patrimonial Kingdoms which are Alienable, and such as are not Alienable. In the former there is no doubt, but that exheredation is lawful; for such Kingdoms differ nothing from other Goods: and therefore in such places, where by Law or Custome Exheredation is in force, it is practicable even in the case of Kingdoms: yea, though there were no Law or Custome to warrant it, yet naturally it is lawful for a Father to exclude his Son from all but bare Alimony; yea, and from that also, if he have committed any Crime worthy of death, or have been otherwise notoriously wicked, and have of his own whereby otherwife to subside. Thus was Reuben punished by Jacob with the los of his Birth right; and Adonijah by David with the los of his Kingdom: For Davids Kingdom was in a manner Patrimonial, though nor by the right of War, yet by special donation.
donation from God himself. Now where the Kingdom is Patrimonial, the King may nominate which of his Sons he will to succeed him, as the Kings of Mexico now do. Nay, if the eldest Son have provoked his Father by any hainous crime, and there be no manifest sign that he hath forgiven him, he shall be as one tacitly interredated. But it is otherwise in Kingdoms not alienable, though they be hereditary, because the people are left pleased that the Kingdom shall descend in an hereditary way, especially from an Infeitate. Much less shall it be in the power of a Father to exterminate his Son where the Kingdom is to pass in a lineal descent. For there without any imitation of an Inheritance, it was agreed in its first Institution, That the Kingdom should by the peoples gift pass to every person of the Royal Family, in such order as was then prejudic'd.

Another Question is this, Whether a King may so abdicate his Kingdom as to deprive his Son of his Right to succeed, which is resolved by the same distinction. For in Kingdoms merely hereditary, he that renounceth his Kingdom, cannot transfer it to his Son. But in lineal descents the Fathers act cannot null his Sons Right that is born. For as soon as the children begin to exift, the law makes provision for them; yes, and for those that are to be born so, because that right which, by the peoples consent is entailed upon them, must in due time descend upon them. Neither doth that which I have already laid concerning transmision, contradict this. For that transmission is Necessary, as to the Parents, and not Voluntary. But yet a difference there is between those Children that are born before the Renunciation, and those born after: For they that are already born, have by the Law a full Right to the Kingdom, though they that are not permitted to enjoy that Right during the life of their Parent; but to those not born, there cannot as yet be any Right acquired: and therefore it may be taken away by the will of the people, if the Parents also to whom it belongs to transfer that Right unto them, be willing to release it. And to this purpose is that we have already laid concerning dereliction.

Another Question doth sometimes arise, namely, who shall be judge of the Right of Succession to a Kingdom: Whether the King then reigning, or the people by themselves, or by such Judges as they shall appoint. If the Question be put of such a Judgement as is Authoritative, neither of them have any Right to judge. For Jurisdiction there cannot be, but in a superiour, who should have respect not barely to the person, but to the matter also, which is to be poised with its due circumstances. But the case of Succession is not properly under the Jurisdiction of the present King: because he cannot of himself by any Law bind his Successor. For the Succession to the Empire lies not under the jurisdiction of the Empire, but remains in the state of Nature, wherein there was no jurisdiction at all. But yet notwithstanding, if the Right of Succession be controverted, the pretenders unto it will do very piously and justly, if they can agree between themselves upon some indifferent persons, to whose arbitrement they can be contented to refer themselves; whereof we shall discours hereafter. But the people have transferred all their Jurisdiction from themselves into the King and the Royal Family; during which, they cannot challenge to themselves any reliques of it. This I mean of a true Kingdom, and not of every Principality. But yet, if in the discoursing of this Right any question do arise concerning the primary will and intention of the people at the first institution of the Kingdom, it were not amiss to take the advice of the people in present, that is, of all the three States; I mean, of the Nobles, Clergy, and Commons in Parliament assembled, as usual in England and Scotland, as Camden testifies in his History of Queen Elizabeth: For the people in present may be judged to be the same they anciely were. Or by Delegates purposefully chos'n, as in the Kingdom of Arragon, unless it do sufficiently appear, That the people then were clearly of another will, and that thereupon the Right of Empire was obtained: Thus did King Euphanus suffer the Meffians diligently to enquire which of the Royal stock of the Appiadae had most Right to the Kingdom. But the contest between Xerxes and Artaxerxes was determined by their Uncle Artaphernes, to whom it was amicably refer'd, as to a Domiclack Judge.

But let us proceed to other cases. It hath been often controverted which of the two Sons hath the best Right to the Succession: He that was born before the Father gained the Kingdom, or he that was born after: Whereunto the most Rational Aniverse is, That he that was first born, shall first succeed, if the Kingdom be indivisible, which holds true in every kind of Succession. (Yet did Henry the First, youngest Brother to Rufus, assume the Crown of England, whilst his elder Brother Robert was in the Holy Land, upon this pretence, That he was born to his Father after he was Crowned King of England, whereas his Brother Robert was born whilst his Father was Duke of Normandy only; yet was Henry justly branded as an Usurper of his Brothers Right, by Mat. Parisiensis.) But in case the Kingdom be divisible, without doubt the latter shall have his share, as well in this as in other goods, concerning which it matters not when they were got.

XXVI.

Whether a King may renounce his Kingdom. In a Kingdom merely hereditary he may, but not in a Lineal Succession.

XXVII.

Whether the King, or the People only, have a Right to judge of the Succession. 

Pat. de fide. 
Paul. lib. 4. 
Juxta. lib. 2. 

1571. 
1572. 

Mat. de fide. 

from amare. 

The Son born before his Father wasking, shall be prefered before him that was postficate.
Of Succession to Kingdoms.

BOOK II.

Now if he that of a divisible Estate may have his share; and in that which is indivisible, is preferred by the priviledge of his birth: Surely even the Inheritance must follow that Son which was born before his Fathers first Inve折射. But even in a Lineal Succession, a Kingdom is no sooner got, but the Children which are antenate, do immediately conceive an hopes of Succession. For admit that there are none born after, surely no man will lay, That those before born are to be excluded. But in this kind of Succession an hope once conceived begets a Right: Neither doth it by any poofpfalt determine, unless it be in a Cognatical Succession, where it may be for a while suspended, by reason of the priviledge of Sex. Thus was the case decided in Persia, between Cyrus and Artaxerxes; in Judaea, between Antipater, the Son of Herod the Great, and his Brethren; In Hungary, when Géfis began his reign; and in Germany (though not without Blood) between Otto the first, and Henry; and in Turkey, between Bojarz the antenate, and Gémer the posterior, to the Empire. And though haply it may be true, that the choice of the Kings of Persia did much depend upon the fuffrages of the people; yet were those fuffrages always limited to the Royal Family: For this mench doth Mariana teftifie of the Aftrians, who being Parthians reigned in Persia. And the like doth Zonaras in Tufcin, of those Persians that succeeded thefe Parthians.

But that it was otherwife in Sparta, we attribute to the Laws proper to them only, which gave the Sons that were postnate the Preheminence, for their more Heroic Education. The like may also happen by some peculiar Law made upon the first Inve折射ure, if a Sovereign Lord fhall give unto his Vaffal, and to those that fhall be born of him, an Empire, to be held of him in Fee: upon the strength of which Argument, Lewis (in the conteft that arose between him and his Brother, Cætamin for the Dutchy of Millian) did principally rely. For in Persia, That Xerxes the Poftnate Son was preferred before Artaxerxes the Antenate, was more by the power of Arefis his Mother, than by true right, as Herodotus obferves. For in the fame Kingdom when the fame Controvertie afterwards arose between Artaxerxes, Mithron and Cyrus, the Sons of Darius and Parifarха., as the fuffrages of the Prince, being begotten by his Father in his private condition, was notwithstanding falted King. Unles, we take that as granted, which Ammianus hath delivered unto us, That the Succession to that Monarchy did much depend upon the fuffrages of the people, confined only within the Royal flock.

It is no lefs disputed both by Wars and tingle Combats, whether the elder brothers Son, his Father being dead, should fucceed before the second Brother. But this in a lineal defcent will hardly admit of a difpute. For herein are the dead reckoned as living, in that they are able to transfer a Right to their Children; therefore the Son of the deceafed, fhall doubtles in fuch a Succession be preferred, without any exception made to his age,yet, and where the Succession is cognatical, the Daughter of the eldest Brother fhall be preferred before the Uncle: becaufe in fuch Successions neither Sex nor Age fhould make us to decline the right line. But in fuch Kingdoms as are hereditary, yet divisible, there fhall each have a share, unlefs it be where the Right of Reprefentation is not as yet received: as of old among many of the German Princes: For it is but of late that Nephews have been admitted before their Uncles. But where it once comes into debate, surely the Nephews cafe is to be preferr'd, as being moft pleasing to humane Nature. And where by the Civil Laws of any Nation, repreffentative Succession is once openly admitted, there the Son of the deceafed Brother fhall succeed in the room of his Father; though in that Law the word Proximus, that is, Next of kin, be only mentioned. The Reafons that are extracted out of the Roman Laws for this, are but weak; as is evident to fuch as infpect them. But this is the beft reafon, That in matters that are to be favourably underfood, the fene of words must be extended to all propriety, not only vulgar, but artificial. So that under the name of Sons, may be comprehended thole of Adoption; and under the word Dead, may be included thole that are dead in Law, because the Law doth not always fpeak thus. And thus may defectively be faid to be Proximus, whom the Laws preferre to the next degree. But even in Kingdoms that are hereditary, and withal individual, and where this Representative Succession is not excluded: Neither is the Nephew always preferred to the Succession, nor always the second Son, but as amongf equals; because by an effect of Right, as to degrees that are adequate, his cafe is beft that is eldest. For as we have faid before, in hereditary Kingdoms, Succession is guided by the priviledge of age. Among the Corinthians, the eldest Son of the deceafed King did fucceed in his Fathers Throne. So among the Vandals it was provided, That the next in Blood to the firft King, and the eldest fhould be declared Heir. So that the second Son, because of his maturity of years, was preferred, before the Son of the eldest Brother. So in Sicily, Robert, being the Second Son, was advanced to the Throne before Martel, his elder Brothers Son, not properly for the reafon fanfied by Rartalus, because Sicily was held in Fee (as it were) by a Superior Lord; but becaufe that Kingdom was hereditary. There is in Cymneum an ancient example, of fuch a Succession
Succession in the Kingdom of the Franks; but that proceeded rather from the peoples choice, which at that time did not fully cease: But since that Kingdom ceased to be Elective, and that the line of Agnatical Succession was there established, the matter admits of no dispute. As ancienstly among the Spartans, where as soon as the Kingdom came to the Heralds, the fame Agnatical Succession was introduced. And therefore Aloys, the Son of the elder Brother Cleonymus, was preferred to the Crown before his Uncle. But even in a Lineal Cognatical Succession, the Nephew hath been preferred: As in England, John, the Nephew of King Edward by his eldest Son, was preferred before Henry and Thomas: Which all is settled by Law in the Kingdom of Castile.

By the same distinction we may resolve another doubt, between the surviving Brother to the last King, and the Son of the elder Brother: But that we must know, that in many places, where among children, the living may succeed in the room of the dead in the right line, they are not permitted to do it in the tranverse. But where the Right is not clear and undisputed, it is most rational to incline to that part which favours the Child in the Right of his Father; because we are thereunto guided by natural equity, namely, in that Estate which descended from his Ancellors. Neither is it any impediment, that Justinian calls the Right of Brothers Children, Depredatory: For this he doth in relation to the ancient Roman Laws, but not to natural equity. Let us now proceed to examine the other cases proposed by Justinian Cofa.

The Son of the deceased Brother, or even his Daughter, he faith is to be preferred before the Kings Uncle: This is true, not in a Lineal Succession only, but even in a hereditary, in such Kingdoms where Representative Succession takes place; but not in such Kingdoms which in express terms do bind us up to the degrees that are Natural. For there they are to be preferred, which have the precedence of Sex and Age.

He further adds, That the Nephew from the Son is to be preferred before the Daughter: It is true, By reason of his Sex; yet with this exception, Unless it be in such a Nation, which even amongst Children respects only the Degree.

He farther adds, That the younger Nephew from the Son is to be preferred before the elder from the Daughter; which is likewise true, where a Lineal Cognatical Succession is in use, but not in an hereditary, without the warrant of some Special Law. Neither do we approve of the Reason alleged, namely, because the Father of the one, was to be preferred before the Mother of the other: For that was by reason of his dignity, which was meerly personal, and defended no farther. And yet on the contrary, we read that Ferdinand, the Son of Berengaria, the younger Sister of King Henry deceased, was preferred to the Kingdom of Castile before Blanch, the elder Sister of the same King: But this, as Mariam observes, was done in hatred to the house of France, into which Blanch was married.

That which he adds, as seeming to him most probable, namely, That the Neece from the elder Son excludes the younger Son; cannot hold in hereditary Kingdoms, although Representative Succession be there in force. For that gives only a capacity to succeed: But of those that are capable, regard is to be had to the priviledge of the Sex.

And therefore in the Kingdom of Aragon, the Sistres Son was preferred before the Brothers Daughter: And as Mariam observes, It is credible, that in that Kingdom in times long since past, The Kings Brother, and not his Daughter, had the Right of Succession: But afterwards they were so well pleased with a Lineal Succession, that they preferred the Sistres Son before those that, in a more remote degree, descended from the Brother. And in another place, speaking of Alphonatus, he faith, That unto the Inheritance of the Kingdom of Aragon, after his Son Ferdinand, he appointed his Nephews by his Sons; and for want of such, then the Nephews by his own Daughter were to be preferred before the Daughters of the said Ferdinand: Whereunto he adds, Sic Sane ad Arbitrium Regnum Jura Legem Comitatur: They are Titles to Kingdoms oftimes fann'd about by the breath of Kings.

After the same manner, In Kingdoms that are hereditary, the Daughter of the eldest Son shall give place to the Kings younger Brother.
Of Dominion vulgarly said to be acquired by the Law of Nations.

I. Many things are attributed to the Law of Nations, which to speak properly, are not thereby due.

II. Fish and Deer in Ponds and Parks, are by the Law of Nature held in Propriety, contrary to what the Roman Laws deliver unto us.

III. That Wild Beasts straying out of Enclosures, cease not to be the first owners, if they may be known.

IV. Whether the possession of them may be gained by Infrumens, as by Nets; and how.

V. That such Wild Beasts should be the Kings, is not contrary to the Law of Nations.

VI. How the possession of such things as have no owner may be gained.

VII. Many found, whose it is naturally; and of the diversity of Laws about this.

VIII. That those things which by the Roman Laws are delivered unto us concerning Islands and Increments, are neither Natural, nor from the Law of Nations.

IX. That Naturally Islands in Rivers, and the Channel being dried up, are theirs, whose the River or that part of the River was, that is, the peoples.

X. That Naturally the Propriety of a ground is not lost by an Invasion.

XI. That Increments, if in doubt, are the peoples.

XII. But they seem to be granted unto those whose grounds have no other bounds but the River.

XIII. That the same may be presumed concerning whatsoever the stream leaves dry.

XIV. What is to be accounted an Increment and what an Island.

XV. When the Increments belong unto Falsfals.

XVI. The Arguments whereby the Romans would prove their Law to be as it were Natural, answered.

XVII. That a way is naturally an Impediment to Increments.

XVIII. That it is not Natural, That the Child should follow the condition of the Mother only.

XIX. That Naturally a thing may be made Common, as well by giving a Form to another man's matter, as by confusion.

XX. Tea, though that matter be ill-brought.

XXI. It is not Natural, that the leffer part should yield to the greater; by reason of its prevalence; where also are observed other Errors of the Roman Lawyers.

XXII. Naturally by planting, sowing, or building upon another's ground, there ariseth a community to both in the Fruits perceived.

XXIII. He that sows another's ground, by mistake, may require his Charges, but not the Fruits.

XXIV. Tea, though he doth it knowingly.

XXV. That Naturally Tradition is not necessary to transfer Dominion.

XXVI. The use of what hitherto been said.

Now our Method leads us to treat of that Dominion, which is vulgarly said to be acquired by the Law of Nations, which being distinct from that gained by the Law of Nature, we have therefore termed the voluntary Law of Nations. Such is that Dominion which is got by the Right of War: But of this we shall discourse better hereafter, where the effects of War shall be explained. The Roman Lawyers, where they treat of the gaining of the Dominion of things, do reckon up many ways whereby it may be acquired, which they seem to justify by the Law of Nations. But to him that diligently examines them, there is hardly any, except that gained by War, that will appear to be gained by that Law of Nations whereof we now speak. But are either such as are to be referred to the Law of Nature, not that which is meerly fo, yet to that which follows close upon it, Dominion, being first introduced, and so antecedes all Civil Law; or they are such as may be referred to the very Civil Law, not that of the sole people of Rome, but of many other Nations: Which I rather believe, because this Civil Law or Gultome came originally from the Greeks, whose Institutes, as Dionysius Halicarnassensis observes, with some others, all Italy and some other adjoining Nations followed. But this is not the Law of Nations, properly so called. For it serves not to conglutinate all Nations mutually among themselves; but rather to preserve peace and tranquility between the Subjects of every Nation: And was therefore alterable by any one people without consulting the rest, so that it may also come to pass, That in other places and in other ages, a far different common custom; and in others, another Law of Nations, improperly so called, may be introduced: Which we have found really done, as soon as the German Nation had invaded all Europe. For as of old the
the Græciain Laws, so then, the Germans were almost every where received; and do as yet flourish. The first way of gaining Dominion by the Law of Nations, as the Romans call it, is by the primary seizure or occupancy of such things as have no owner, which without doubt is natural in that sense which I have declared, that is, Dominion being first introduced, and so long as no Law did otherwise determine. For Dominion may also be gained by the Civil Law.

And hitherto in the first place we may refer the taking of Wild Beasts, Birds and Fish. But how all these may be laid to belong to none, will afford matter of debate. 

Neroa is the Son of opinion, that Filh, if in a Pond, were poiffel, but not in a great Lake: And that Wild Beasts, if in a Park or Warren, had an owner; but ranging in Woods hedg’d about, not. As though Filh incofled in a greater Pond could not be as well owned as in a leafe; and Deer and Couies as well poiffel in a well fenced Wood, as in a Park or Warren: Seeing that there is no more difference between them, than that in the one they are clofe Priſoners, and in the other Priſoners at large. Wherefore in this age of ours, the contrary opinion is most prevalent, That both Deer in private Woods, and Filh incofled in Lakes may be, as poiffel, so also held in Propriety.

In Wild Beasts, as soon as they recover their Natural Liberty, we lose our Property, say the Roman Lawyers. But in all other things the Dominion that is got by Possellion, is not lost with the lofs of Possellion; nay, it gives us also a Right to recover our Possellion: And whether it be taken away from us by another, or it lay away of itself, as in the cafe of a Fugitive Servant, it matters not much. (The Title we may retain though the Possellion be loft.) Wherefore it seems more agreeable to truth, That our Property is not lost merely because the Beasts that were wild have escaped our custodia; but because it may probably be conjectured, That by reaſon of the difficulty of recovering them, we have utterly deferted them; especially when it cannot be known unto others that they were ours; But this conjecture may easily be wiped away by other conjectures as namely, by affixing unto them γνωστοµα, some things whereby it may be known whose they are, as is usually done to Harts, Hawks, and the like. To acquire a full Dominion in things naturally wild, it is necessary that we should have a Corporal Possellion: It is not enough to entitle our selveto a Deer, that we have wounded him; but we must catch him too, left the Proverb upbraid us with folly. In starting an Hare for another to eat. According to that of Ovid,

* Ex leps hic alia exigainus erit.*

By the Law of the Lombards, He that killed a Wild Beaf, being fift. Wounded by another, might take away the Shoulder with the Ribs; the reft belonged to him that wounded him, if he claimed it within twenty four hours, otherwise not. For as Ovid well observed, It is one thing to know where a thing is, and another to find it.

Now this Possellion may be gained, either by Hands only, or by Engines, as by Traps, Nets, Snares, Ginnis, &c. Provided, ftirthat those Instruments be under our own power: And secondly, That the Beaf fto taken cannot escape. And this is the question decided, concerning a Wild Boar that is fallen into a Snares or Toy.

These things are thus to be understood, where no Civil Law intervenes, whereas our Modern Lawyers are much mistaken, who think these Rights to be fo Natural, that they cannot be changed: For they are not simply or absolutely fo, but as things at that time were, before the Civil Law did otherwise determine of them. The people of Germany conftuting about some allowances to be given to their Kings and Princes, whereby to support their Regal Dignities, thought it prudence to begin with such things as no private man could claim as his own: Which prudential course the Egyptians also anciently took; where the Kings Attorney feized on all fuch things to his Matters use. But the Law of it self is sufficient to transfer a Propriety in any thing that is not already occupied. The Whales that are caft upon the Shoar, the Portugals give unto their King.

After the fame manner as Wild Beasts are poiffel, are all other things that have no owner. For Nature doth indifferently adjudge all fuch things to the first finder and poiffel for of them. Thus was the Island Acornboe being defart, adjudged to the Inhabitants of Chalceis, who ftarted upon it; and not unto the Andrians, who had firft thrown their Darts into it. Because Possellion is taken either by the apprehending of a thing, if movable, moftly by the hand; or if immovable, as of Land, by fetting our feet up on it. For as the Poet tells us, Scire ubi res est, non est inventire; It is not enough to know where a thing is, unless we can find it.

Among
Treasures found whose they are: Of Islands and Increments. BOOK II.

VII.

Among such things as are \( \Delta \wedge \nu \wedge \lambda \alpha \) without an owner, are Treasures reckoned, that is, Mony, the owner whereof is unknown, Err things that appear not, are as if they were not; wherefore such treasures are naturally his that finds and apprehends them, yet not so but that Laws and Customs may dispole otherwise of them. Plate would have the finder to give notice thereof to the Magistrate, or to take advice of an Oracle. Appollonius looked at such treasure, as being an especial gift of God, and adjudged it to him that was belted beloved of him. It is Scripture Law, Quod non posset se tollas; Take not away what thou didst not lay down: The Hebrews gave such treasures to him that was Lord of the ground wherein it was found, as may be collected from that parable of our Saviour, concerning Treasures hidden in the ground, which being found, he that found it fold all he had, and bought the Field, Mat. 13. 44. So did the Syrians, as may be gathered out of Philostratus: And it feems that in Plantus his time, this was approved of by the Romans. The Laws of the Empire do much vary about this, as may appear partly by their constitutions, and partly by the Histories of Lampadius, Zonurus, Cedrenus, and Tacitus, who writing of the great Treasures found in Africa, faith, Which Nero in his hopes devoured. The Germans gave such (as also they did all other \( \Delta \wedge \nu \wedge \lambda \alpha \)) to their Prince, which is now fo common every where, that it may well pass for one of the Laws of Nations: For it is this day observed in Germany, France, England, Spain, and Denmark. But this very famous custom we read of among the Greeks, witnesse King Theudric in Caffiodore: Non est cupiditas eripere, quo minus tu dominus ingemect amissit; It cannot be imputed as Covetousnes, to take that which no man hath just reason to complain for the loss of. And in another place, Thofe riches which having lain so long hid have left their Masters, by their diligent inquisition, are now ours: For since we permit every man freely to enjoy his own, what is no mans ought to be ours. He may well be content to live what he hath found, who knows that in so doing he loyeth nothing that is his own.

Let us now proceed to Inundations or Increments by Rivers, whereof the ancient Lawyers have written much, but the Modern whole Commentaries: But what they have written is for the most part grounded not on the Law of Nature, but on the Laws of some Nations, though to gain the greater authority they oftimes put them under that name. Most of their determinations being built upon this foundation, That the banks of the River are his who poifefleth the adjoining foil, and that the Channel, as soon as it is forfaken by the waters, is his alfo; and confequently, thofe Islands which are caft up in the River. There they diftinguifh of Inundations, a small almoft alters not the property of the ground, but a great one doth; yet so that if it come by refton of some fudden and violent force of waters, and so recede, the ground overflown shall, upon the return of the waters, as if by poftliminy, remain to its right owner: But if by a continual beating upon it, it walketh away by degrees, it is left for ever. Now that all these might be introduced by fome Law, to make men more carefully to defend their own lands, I deny not; but that they be fo by a Natural Right (as they would have it) I cannot grant.

For if we reflect that which mostly happens, the foil is first poifefled by the people, and that, not only under the foreign power or Empire, but under dominion alfo, before the Fields were diftributed among private persons. The boundaries of the Athenians or Campions, faith Seneca, are thohe whereby their Fields (which before lay in common) are by private agreement between themfelves and their Neighbours, diftinguifhed. So alfo Cicero, Priva na tura nulla funt; There is nothing naturally private, but either by primary poifeflion, as they that first foot footing in a place that is defart; or that which comes by conquest or by Law content, condition, or by Laws, whereby it comes to poffefs, that the fields about Arpinum are faid to belong to the Inhabitants of Arpinum, and the Fields of Tufculum, to the Inhabitants of Tufculum: And thus is every private man's office defcribed. So Dion Pausiani, There are many things which a City in general challengeth as her own, though they are divided by parcels amongf private Lords. After the fame manner speaks Tacitus of the Germans, That their Fields were firft occapt by the people in common by Villages, according to the number of the Inhabitants, and afterwards distributed among themfelves, according to every man's reputation and dignity: Wherefore whatsoever was thus originally poifefled by the people, and never afterwards distributed, doth as yet properly belong unto the people. And as in private Rivers, thofe Islands which the waters caft up, and that part of the Channel which the waters forfake, are properly his who owns the River; fo in pebbles are both of them the peoples, or his, to whom the people hath given them. Now what is here faid concerning the Channels, may alfo be faid of the Banks, which are but the extreme parts of the Channel, wherein the River naturally runs; and thus it is every where taken. In Holland and the Countries adjacent, many fuch disputes did anciently arise, by reafon of the lownes of the ground, the greatnes of their Rivers, and their nearnes to the Sea, receiving and cafting up by alternate tides, mud and sand: Thofe that were Islands, truly fo called, were always adjudged to be part of the peoples patrimony; as alfo the whole Channel of the Rhine and of the Meule, which the Waters have left, as it hath been frequently determined, and with very
very good reason: For as the Roman Lawyers themselves do grant, that the lands which float in a River, being upheld by the young sprouts that grow in it, of right belong to the Common-wealth; because, Cujus juris est flumen, ejus est & infuffle flumine natura; Where the River is, his is the Island that is in it. And surely there is the same reason for a River, as for the Channel wherein it runs, not for the reason which they bring, namely, because the Channel is covered by the River; but for the reason aforesaid, because it was originally polled with the River, and was never since transferred into any private mans dominion. Neither can we admit of that as true naturally, which they aver, that if the Fields be bounded, the lands are the first Occupants; for that indeed were true, in case that neither the River, nor with it the Channel, were at all polled by the people: for then they were like those Islands which are raised in the Seas, his only that did first seize them.

Neither is that more to be admitted, which they write of a great inundation, namely, that it gives away the property of the Land overflowed, as we respect only natural reason: For we admit as much, that the superfluities of the Land may be dissolvido into Sand; yet do the lower parts thereof remain firm and solid, and though somewhat of the quantity be changed, yet in the substance changed all, no more than that part of a Field is, which is covered by some Lake, the property whereof (as the Roman Lawyers themselves do rightly acknowledge) doth still remain. Neither is that natural that they write, that an inundation performs the office of a Judge or Ceifer, making that private which was publick, and that publick which before was private: as Caesar doth speak of a surveyor, Mere vaflisflimus fluminis aliis flavia tollis, aliis concedit; That he was like a great River taking away from some that which of right was theirs, and giving unto others that wherein they had no right. Much better were it to follow that which Strabo reports of the Egyptians, To take an exact survey of the Fields, and so divide unto every man his own by Admission: Because the River Nilus by his frequent floods and rapid streams, adding here and taking away there, and changing the form and marks of the Fields, doth so confound their bounds and limits, that it is hard for a man to distinguish between his own and another mans; therefore are Fields to be often surveyed. Whereunto agrees that tradition of the Roman Lawyers, Quod no funum est, non sumum est non defini, nisi a solo solo; That which is ours is not to be ours without our own faith, or by some Law. Now under things done are (morally) comprehended things left undone, as we have said already, that is to say, so far forth as we may thereby guess at the will of him that should do them. We may therefore grant, that where the Inundation is very great, and where there are no visible signs of the owners intention to retain his dominion; it may well be presumed, that he gives his Land for loft: Now as our conjectures in this case cannot but be naturally uncertain, by reason of the variety of circumstances, which are herein confiderable, and to be referred to the judgment of some prudent man; so ought it to be determined by Civil Laws: As in Holland, That ground is given for loft which hath for ten years been drowned, in case there appear no signs that the polleision is still claimed; which with them is sufficiently done by filling in it only, though the Romans do not allow thereof. But among other Princes the ancient occupants are prefcribed a certain time wherein to dreine their Lands, if they do not, then are the mortgagers of that Land (if engaged) admonish'd to do it; but if they delay it, then the Magistrates either Civil or Criminal, are to do it; and if they neglect it, then it is forfeited unto the Prince, who may either drein it at his own charge, or transfer it to some other, referring a part of it unto himself.

Whatever the floods do add to the foil, because it cannot be known from whence it came, cannot be claimed by any; (for if it could, the property should not be changed) wherefore it is adjudged to be his whose the River is, and if the River be the peoples, conseqently the increment is so too.

But it is in the peoples power to grant it, as unto others, fo unto those who enjoy the Lands next adjoining; and doubtless they are presumed to do, if those Lands have no other bounds but the River on that side: And although that distinction which the Romans make between Lands bounded, and Lands measured, be of good use; yet have both of them in this case equal right. For what we have faid before concerning the bounds of Empires, is of force here also with this only difference, that the bounds of Kingdoms (if in doubt) are presumed to be aconfiscious, because those are most agreeable to their nature; But private polleisions are rather believed to be set out and bounded, either by Landmarks or by measure, as being most suitable to theirs. But yet we deny not but that the people may grant their Land as fully as they themselves enjoy it, that is, even unto the River; which if they do, then is the increment of that River theirs also. This was a judged case in Holland, not many Ages since, of grounds bordering upon the Rivers Ij and Maas; because both by the deeds of purchase, and by the books of rates, they were always mentioned as bounded by the River: And although in the sale of thefe Lands, somewhat of the measure be exprest, yet shall it retain its own nature, and have right to whatsoever the River shall add unto it.

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XI.

That the In- 

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doubt, are 
the peoples.

Ch. 3. §. 16.

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What hath been said concerning that which the Floods do add to the soil, is likewise verified of that part of the shore, or of the Channel, which the River forfakes: For where there is no Occupant, there the next Occupyet hath the best Title; but in Rivers that are professed, whatsoever is so gained from the Channel is the peoples or theirs, to whom they have alienged the Lands next adjoining, as being bounded by the River.

Now because there is one manner of right proper to Islands, and another to the increments of Rivers, Controversies do often arise how to distinguish them, especially when a little rising ground lies near the Fields adjacent, yet is separated from them by the intervention of a little water that covers the Plain; as is often seen in the Low Countries where the ground is not level, where also the customs do somewhat vary: For in Gilders, if a laden Wain can pass through the Waters interjacent, then is the rising ground judged to belong to the adjoining Fields; so is it also in the Fields of Potterie. If a man standing upon the bank, can with his Swords point touch the ground that lies beyond the water. Thus the German Histories record of Authoris, King of the Lombards, That sitting on Horseback upon the Shore, and touching with the point of his Lance a certain Pillar, said, Ufque hic erunt Longobardorum fines; Hitherto came King Authoris, and this shall be the bounds of Lombardy. The like story we read of the Emperor Otto, who standing on the bank, threw his Javelin into the Baltic Sea, assigning that to be the limits of his Empire: But it is most agreeable to Nature, that if, for the most part, the passage over be by boat, it should be judged an Island.

Another Question doth no less frequently arise between a Prince that fully enjoys the peoples right, and his Vaillants or Lieutenants, who, under him, are intrusted with the Government: But it is sufficiently evident, that the bare grant of the Government doth not intitle the Vaillay to the increment of Rivers. But yet we must note, That many that are thus intrusted with these limited Governments, do together with them receive the profits of all the * Lands in general, except such as are in the possession of private men: Upon this presumption, that these Fields were anciently either the peoples, or the Princes, or at least drained by the Prince; and if so, then doubtless whatsoever either the Prince or the people did so enjoy, their Vaillants have a good right unto. Thus we see that in Zealand, those Vaillants that have power to appoint Judges, though but in civil affairs, do pay a tribute to the State for their common Fields, whereof every man according to the tenure of his private possession, bears his proportion. Now that these Vaillants have a right to the increment of the Rivers, there can be no doubt: Others there are to whom the Rivers themselves are granted, who may therefore justly claim the Islands thereunto belonging, whether they be of mud heaped up together, or made out of the Channel, if surrounded by the River. Others again there are, in whose grants neither the one nor the other is included, and these have but an ill cause to defend against the publick Exchequer, unless either the custom of the Country do favour them, or a long uninterrupted possession (with such adjuncts as are requisite) give them a right. But in case the Lands only and not the Government be granted unto them, then we must look unto the nature of the Land, as is above said: For if its bounds be arcificial, then are the Increments granted with the Land; not so much by any Right properly belonging to the Prince, as by the quality of the Land; for in such a case, he that holds the Fee hath the benefit of what the Floods call up.

The Roman Lawyers, to prove the Laws by them used to be natural, do often allledge this Maxim, That it is most natural, that his should be the profit of any thing, whose is the disprofit; whereupon they infer, that since the River wafts a part of my Land, it is but reasonable that of what it adds to mine, mine should be the benefit. But this rule holds not, unless it be where the benefit ariseth from what is mine own, but in this case it ariseth from the River which is anothers: But that that which perifheth, should perifh to the owner of it, is natural; besides, neither is that univerfally true that they allledge, as may appear by the exception of grounds limited, which themselves admit: Not now to insist upon that which often comes to pass naturally, that Rivers do sometimes impoverish, and sometimes enrich their Neighbours Fields: Whence Lucan thus,

* Illa terra fugit dominis, his vera colonis
  Accedunt, Donante Pago:*

* Old Lords forsook, the Earth doth gliding go
  New to enrich, thanks to the River Po.*

Whereby it appears, that some are enrich'd and impoverish'd by one and the same River,
Chap. viii. Dominion how acquired.

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But whereas also they say, that a publick way doth not put a stop to the increment of a River, it hath nothing of natural reason in it, unless it be where the Field is private, through which such a way ought to pass.

Among other means whereby propriety (by which that is called the Law of Nations) is acquired, one is Procreation, wherein that, which (as well the Romans as) some other Nations have determined, namely, That the Child should follow the condition of the Mother only, is not (as we have already said) natural, but only as the Father is unknown: For if the Father, by any probable means could be discovered, why the Child should not as well be reputed his as, no natural reason can be given: since it cannot be denied but that what is so begotten, is a part of him that did beget it. But whether of them do contribute most to the production of the Child, Natural Philosophers do not accord: Whereof notwithstanding Plutarch speaks thus, Nature, faith he, doth mix the Seed of both Sexes, and so confound them; that what is thereby born should be common to them both, and that neither of them should be able to distinguish that which is theirs from that which was the others. And hereupon are the Laws both of the French and Lombards grounded.

If the matter belong to one, and the form given by another, the Sabellians give the property to him who the matter was; but Proclus to him that gave the form, because he gave it such an existence as before it had not. At length a middle opinion crept in, namely, that if the matter could be reduced to its pristine form, then should the thing be his who gave the matter; but if it could not, then should it be his that gave the form: But this opinion pleased not Comenius, who had no respect but to the value, so that whether of them was of greater value, should attract unto it that which was of lesser value, by an Argument drawn from those things which are delivered unto us by the Roman Lawyers, concerning Accession. But if we look to the naked truth, as by a composition of several matters there ariseth a community to each, according to proportion, because it cannot otherwise be determined; so when a thing is compounded of matter and form as of its parts, if the matter or subsistence belong to one, and the form to another, (which cannot be divided) there must naturally follow a community to each, according to their respective proportions; for the form is a part of the subsistence but not the whole, which was acknowledged by Ulpian, in saying, that the form being changed, the subsistence was almost destroyed.

But although it be not altogether unjust, that he that abuseth the matter, being another man's, shall lose the form he gives it, yet we must know that this is penal, and therefore not natural: For though it be natural that every delinquent should be punished, yet doth not Nature determine how, nor doth she of her self take away any mans property for his offence.

But that the greater part should swallow up the lesser, whereupon Comenius grounds his opinion; though it be natural in respect of the Fact, yet is it not of Natural Right: Wherefore he that hath but the twentieth part of a Field, hath as much right in that, as he that hath the other nineteen. Therefore what the Roman Lawyers have decreed concerning an acquisition gained by way of prevalence, or what they have or may decree in other the like cases, is not justifiable by the Law of Nature, but by the Civil Law for the better dispatch of business; yet is it not repugnant unto Nature, because the Laws have a power to create dominion. There is scarce any question in the Law, more variously handled among Lawyers than this: For who can grant, that if Brais and Gold were mixed together, they could not be separated, as Ulpian writes; or that if Metals were folded together, they must needs be confounded, as Paulus, &c. or that there is one rule for a Picture, another for a Scripture, that the Table should carry this but not that.

That things planted or sown should go with the soyl, is a dictate likewise of the Civil Law, grounded on this reason, because they are nourished by it; and therefore it is a material question concerning a Tree whether it have taken root: But in case we look unto Nature only, we must confesse, that the nourishment of a thing that had existence before gives but augmentation to the thing nourished, which is but an additional part of it. And therefore as there is a Right due to the Lord of the Soyl, in respect of that nourishment, so fully there remains a Right naturally to him that owned the Plant or the Seed without which the Soyl could not produce such fruits: So that here also Nature admits of a Community, no less than in an Houfe built upon anothers ground, whole parts are the Soyl and the Superstructure, and in which, it was moveable, the Lord of the Soyl could have no right at all: Of which opinion was Scetola.

He that ignorantly owing another mans ground, thinking it to be his own, cannot by the Law of Nature, appropriate all the fruits thereof to himself; but he may charge the owner of the ground with his costs, and with his profitable labour, and pay himself out of the profits either already perceived, or retain tho'e that are extant, if he cannot otherwise get satisfaction.

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And the very same, it seems, may be said of him that is possession of another mans Estate, unjustly, where no penal Law interposes. For though he that possesseth mine Estate be an intruder, or an Usurper, (faith Paulus the Lawyer) yet ought I to satisfy him for his just expenses: For he that seeks only to recover his own, ought not to enrich himself by the loss of another.

The last means of acquiring dominion by the Law of Nations is by Tradition: But (as I said before) this is not required to the transferring of dominion by the Law of Nature, which the Roman Lawyers themselves acknowledge in some cases: As when the property of any thing is given away, but the profits of it referred; or when it is bestowed on him that may hereafter possess it; or when being but lent, it may be kept; (and in such like cases:) Yea and even now a man may in some cases transfer dominion to another, before he hath gained possession himself. As of an Inheritance expectant, of Legacies to be received, of things given to Churches and to pious places, or to Cities, &c. whereof it may be said, Then the delivery of possession seems to be good, when the deeds of gift are in a mans own possession. And thus did the ancient Romans use to alienate things fold by striking the Scales with a piece of Brass, and then giving it to him that made the sale.

These things have I observed, left any man finding, among the Roman Authors, the Law of Nations often quoted, should prefently understand that Law to be such as could not be changed: But rather that he should be able to distinguish between such Laws as are purely natural, and those that are for some certain statute, natural, and between such Laws as are in force amongst many Nations apart, and such as knit together all humane societies. And this likewise is to be observed, That if either by the Law of Nations, improperly so called, or by the Law of any Nation or People, any one way of acquiring a Right or Property be agreed on, without making any distinction between Natives and Strangers; there Foreigners also shall have and enjoy the same Right: And in case they shall be hindered in the confection thereof, they have such wrong done them as may give occasion to a just War.
How Empire and Dominion may Cease and Determine.

I. Dominion and Empire determine, when he that had the Right dies, and leaves no Successor in being.

II. So the Right of a Family dies, when that Family is extinct.

III. The like of a People, when they cease to be free.

IV. Which falls out, when their necessary parts are taken away.

V. And when the whole Body of a People are swept away.

VI. And when their Form is lost, whereby they become a People.

VII. But not by the change of Place.

VIII. Nor upon their change of Government, where also is difficult, what place a new King or free People are to take in general Assemblies.

IX. What if two People be united.

X. What if a People be divided.

XI. In whom now are, what once belonged to the Roman Empire, since there appears no Alienation.

XII. Of the Right of Heirs.

XIII. Of the Right of Conquerors.

How as well Propriety as Empire were at first introduced, and how they may be transferred, is sufficiently difficult: Now let us understand how they may end; and first, that they may determine by a voluntary dereliction hath been already demonstrated: For, 

Will disclaim, Propriety vanishes. Again, they may cease when the Subject wherein they are, is taken away before any Alienation be made of them, either express or presumptive, as in Successions from him that dyed intestate, and leaves no Kindred behind him; wherefore all the right that he had in anything, dyed also with him: Wherefore his Servants (unless the Laws do otherwise ordain) are immediately free, and the people that were in subjection to him are at their own liberty; because these are not in their own nature occupable, but as they are willing to surrender themselves, but all his other goods are naturally his that hath them.

The very fame holds true, if a Family happen to be extinct, whatsoever right it had ceased with it.

So also if a People fail. 

I. (Socrates first, and from him the Emperor Julian, tells us, That Cities are immortal; meaning that so they may be, because the people are a Body consisting of Members remote one from another, yet united under one name; as having but one order or form of Government, as Plutarch calls it; or one Spirit, as Paulus the Lawyer, which animates and informs all the parts of it; and is therefore (as Aristotle terms it) the life of it. But this Spirit in the people is a full and perfect confociation tending to a civil life, whereof the supreme power is the first product: This is the bond that knits all the parts together, the Vital Spirit, as Seneca terms it, Quam tu militia trainuit, which animates so many thousands at once; for plainly the Artificial Bodies have some resemblance with the Natural. The Natural Body though it every day waxes a little, yet wanes that which waxes, is every day repaired, and the same form or figure continued, ceaseth not to be the same body. And therefore that of Seneca, where he faith, That no man is the same being old, as he was when he was young, may very fitly be interpreted, as if underfoot of the matter only: As also that of Heracleus in Plato verified, That no man can descend twice into the same River; Which Seneca thus expounds, 

Mans idem fluminis nomen, aqua transfusa est; The Name only continues, but the Waters glide away. So Aristotle comparing a River to the people, faith, That the River is still called by the same Name, though the Waters are not the same. Neither doth it retain its name in vain, for it hath the same form, figure, and spirit, (as they call it) as formerly it had: So is it in Cities, though the Citizens are not the same that they were an hundred years since. Yet whilst there remains the same confociation and communion, which both constitutes a People, and continues them in the same Mould, Form, and Figure, as they were so many Years or Ages since; it may justly be called the same City, though not one of the Citizens thereof may be now living. As the Ship wherein Theleus sailed with the principal young men of Athens, and safely returned, being by the Athenians (by repairing whatever was decayed in her) preferred, till the time of Demetrius Phalerenus, gave occasion to Philosophers, to dispute, Whether she were the same or another. Which though much controverted by them, yet is by Lawyers prudently adjudged to be the same. For, as

Philos
Philo observes of the World, Not every thing whose parts do successively perish, must certainly be dissolved; but that only, all whole parts do at one and the same time perish together. Hence arifeth that cultum used in Histories, as well sacred as profane, of attributing unto the people which now are, those things which were done by the people of the same City many Ages past: As may be seen, Mar. 23. 35. Asia 3. 22. Mark 10. 3. 7. 6. 3. 2. and 7. 19. So in Tacitus we read, That Antonius Primus, serving under Vespuian, puts the Soldiers of the Tetrican Legion in mind, That it was their colour that routed the Parthian Army under the Conduct of M. Anthony; and that it was their colour that under Corbulo, had put to flight the Armenians. Whereas there was not one of that Tetrican Legion that fought under M. Anthony, then living when he said it, it being done an hundred years before. It was therefore more out of hatred than truth, that Piso in the same Author, doth deny the Athenians of his time to be natural Athenians, whom the Wars (as he pretends) had totally destroyed, but the very same and outcasts of other Nations. Whereas in truth, these mixing with the Athenians, might haply detract somewhat from their ancient honour, and reputation, but not make them another people: Neither was Piso ignorant of this, for in the same place, He objects against the same Athenians, those Injuries which had been done many Ages before, namely, how they had assisted Mithridates against Scylla, and M. Anthony against Augustus, and how unsuccessfully they had made war against the Macedonians, and what cruelty they had exercised over their own Subjects. Now as there may be many particular changes in a Nation, and yet the people continue the same, they were a thousand years since and more; so it cannot be denied, but that there may happen so universal a change, as that they may utterly cease to be a people; which may be done two ways, either when the whole body of the People is destroyed, or when that order, form, or spirit, that unites them together, is totally abolished.

The Body perishes, either when all its Members are at once destroyed, without which it cannot subsist; or when, though the parts be entire, yet the frame is disjoyned and its parts dissipated: By these two ways is an Army destroyed, either by an universal Slaughter, or by a total Dissipation. Among such as to be a people the former way, are those that perish universally by some deluge; as did the people of the Aetolian lands, whereas Plato makes mention in his Times; and such as are swallowed up by some great Calm, occasioned by Earthquakes: Examples we may read of in Seneca, in Ammianus Marcellinus, and elsewhere; and such as have voluntarily destroyed themselves, as the Sydolians and Sagenians. But what if, of such a people, so few remain alive, as that they cannot be said to be a people, yet may they retain that propriety which that people had, as private persons; though what they had as being a people,they cannot: The same is also to be underfood of Corporations and Colleges.

The frame or manner of being a Body is taken away, when the Citizens do either of their own accord dissipate themselves, by reason of some general contagion or sedition; or when they are by force so scattered and disperset, as that they cannot unite again, as it often happens in times of War: All Bodies confisting of remote parts, as Fleets, Hosts, Armies, being knit together no less than members of the same body, if they be forced ad junct, unifi, and are disjunct, as a Ship that is torn in pieces.

The form and spirit of a people perishes, either when all or a perfect community of Right is taken away; which is done either when every person is brought into captivity, as when the Mycenians were by the Argives, the Olympians by King Philip, the Thebans fold by Alexander, and the Britons condemned by the Romans to their publick works; or when enjoying community of Right, yet they are utterly deprived of all Government. So Livy of Capua, It pleased the Romans that their Town should be inhabited, but that there should be no Corporation of Citizens, no Senate, no Common Council, no Magistrates, but a multitude of Folks without any publick Assemblies, and without any Jurisdiction Civil or Military; all these among them being to be decided by a Governor sent from Rome. So that as Cicero observed, in his Oration against Rutilus, There was not left in Capua so much as the face or shadow of a Commonwealth. In the very same condition are those people, who being once a free Nation, are reduced by force into a Province; and those also who are subjected to the power of another people, as Byzantium was by the Emperor Severus to Persia, and Antioch by the Emperor Theodosius to Laodicea.

But if the people shall change their habitation, either voluntarily, through scarcity of things necessary, or any such inconvenience, or being thereunto compelled, as the Carthaginians were by the third Punic War; if the form or spirit of Polity do yet remain, they do not cease to be a people, much less if their City Walls only be call down: And therefore when the Lacedaemonians refused to admit of the Mycenians, among the rest of the Cretian Cities, to swear the conservation of the peace of Greece, because their Walls were destroyed, it was carried against them by the common suffrage.

Neither doth it much alter the case, under what Form of Government the people are, Monarchical, Oligarchical or Democratic; that is, of King, Nobles or People. The Romans

BOOK 11.

IV.

As when their necessary parts are taken away.
See Str. Nat. Quell. lib. 5. c. 23. 32. Epit. 52.
Lib. 17. ternum. grl.

The few remaining may retain their propriety as a private person, but not as a State.

V.

When the whole people are swept away.
Arif. Pol. l. 1. c. 2. Philo de mund.

VI.

Or when the Form or Spirit is left.
Lib. 26.

VII.

But not by the change of their Seats.
Vit. Afrile.

VIII.

Nor by the change of Government.
Romanus were but the same people, whether under Kings, Consuls, or Emperors: yea, though the Government be never so absolute, yet are the people the fame they were, as when they were free, so long as he that governs, governs as the Head of that people, and not as the Head of another. For that Sovereign Power, which resides in the King as Head, relents in the people, as in the whole body, whereof the King is the Head; so that if the King being elected, should dye, or if the Royal Family be extinct, the Right of Government recedes back to the people, or to whom they grant it. Neither is that of Arifotel to be objected against me, who denies that to be the fame City, the form of whose Government is changed: As the Harmony cannot be said to be the fame, that is changed from the Doric to the Phrygian way: For we ought to know, that of any one artificial thing, there may be several forms: As of a Legion or Regiment, there is one form, whereby the Souldiers are governed, and another wherein they fight: So there is one form consisting in a Confociation of Right and Empire, and another, in relation to the parts between themselves, as those that are governed, and of those that govern. This latter, the Politician respects, as the Lawyer doth the former: Neither was Arifotel himself ignorant hereof, who presently adds, But whether the Form of Government being changed, all debts and reckonings be discharged or not, is a question belonging to another Art, which Arifotel would not confound with his Politicks; lest what he blamed in others, he should practice himself, making a transition from one kind of Treatise to another. Surely a debt contracted by a free people cealeth not to be a debt, because they have admitted of a King; for the people are the fame, and do still retain the Right and Dominion of those things, that formerly were theirs, yea, and the Empire too, though now it be not exercised by the body, but the head: whence we may easily determine that Controversie, which is sometimes started, concerning his place in General Councils, who is newly made a King over a Nation formerly free; namely, that he is to be admitted into that very place which that Nation enjoyed, whilst it was free: as Philip of Macedon in the Great Council of Amphictyon, took that place that was due to the Phocesers; so on the other side, That place which formerly belonged to the King, the people shal proceed in, being made free.

But if two people or Kingdoms be united, the Rights shal not be lost, but comunicated, as the rights of the Sabines first, and afterwards of the Albanes were transferred into the Romanus, and fo were made one Common-wealth, as Livy records. The fame may be said of Kingdoms being conjoined, not in League, nor as having but one King, but being perfectly made one. But if a Nation or Kingdom be divided, either by mutual agreement, or by the Sword, as the Persian Kingdom was by Alexander's Successors, then of one entire Empire there shal be made two or more; and each shall enjoy its peculiar right over its particular parts; Or if any thing shall be held in common, it shall be either ratably divided between them, or else be administrated in common. Hither we may refer those, who are sent out to plant Colonies: For this is usually the Rife of a new free people; For we do not (as Thucydides notes) send them out as our fervants, but as those who have equal right with our selves. And thus did King Tullus in Dionysius Halicarnassensis judge of this case, That the Mother Cities should govern their Plantations abroad absolutely, as if by the Law of Nature, we conceive to be neither true nor righteous; yet ought they to reverence them, as the Carthaginians did the Tyrians their first Founders, as Carusius testifies.

It is also a famous Quesiton much controverted both by Historians and Civilians, To whom the rights belonging formerly to the Roman Empire do now appertain: Some say, to the German Emperor, which by I know not what deputation, they place in the room of it. But it is sufficiently known, That the Great Germany, namely, that which lies beyond the Rhine, was but a little while within the pale of the Roman Empire: And to translate the rights of Kingdoms from one to another without certain and evident proofs, feemes to me to be too great a presumption. Wherefore, I am of opinion, that the Roman people are now the same they were of old, though somewhat mixt by the access of Foreigners; and that the Empire doth still remain with them as in a Body Politick where-in it was and should live. For whatsoever the people of Rome had of old a right to do before they had Emperors, that they had the same right to do in their Interregna, or vacancy of their Emperors. Yea, and the very Choice of their Emperors was their right; who were often made either by the people by themselves, or by the Senate; yea, and those Elections which were made by the Roman Legions, (as fuch there were, sometimes by thofe, and anon by others) were not firm nor iniable by any right that thofe Legions had: (for from a Fleeting power no right can be certain), but by the approbation of the people. (When the two Roman Generals Publ. and Cæ. Scipio were both ilain, and the Army had chosen L. Martius, a valiant young Gentleman their Captain General, though he had vanquished two several Armies of the Carthaginians, and forced their Camps;
Empire with Lumbar was The

Camps; yet notwithstanding when in his Letters to Rome he had affirmed that Honourable Title of Pro-Preator, the Senate (considering that his Command was neither granted by the people, nor allowed of by themselves) were much offended at his presumption in usurping it; fore-seeing well, that it was a matter of dangerous consequence, for Soldiers abroad to make choice of such as should command Armies and Provinces: And that the solemnity of Elections, so devoutly begun in the name of their Gods, should now be transfer'd into Camps, far from Laws and Magistrates. But yet we have many examples of Elections made by their Armies; but for, as they were afterwards approved of, and confirmed by the Senate: as were those of Adrian, Pertinax, Julian, Severus, Maximinus, Balbinus, Aurelian and others. Capitalists records an Epitaph of Albinius concerning the right of the Senate in, the Election of their Emperor, and another of the Senate concerning the Gordiani. Maximus in an Oration thus speaks the Senate concerning the Roman Legions, They have conferred the Empire on me, the defence whereof, O Father's Conscript, I do in the mean time undertake: and if it be as pleasing to you, as it hath been unto them, I shall also undertake the Government. So also doth the Emperor Tacitus in Populcius. Me, faith he, hath the Senate made their Prince, according to the prudent advice of the Army. To the like purpose is that of Majorianus to the Senate, Remember that I was made Emperor as well by your own Free Suffrages, as by the appointment of your present Army. The Roman Empire (as Maximins in Herodian tells his Soldiers) is not the possession of any one man, but the Ancient Inheritance of the whole people of Rome; upon whose safety the Empire depends. And we together with you are to this purpose chosen, that they through our Care and Courage may live securely. Neither doth it avail to the contrary, to say, That by the Constitution of Antoninus the Emperor, all that lived within the Verge of that Empire, were made Roman Citizens: For by that Sanchon, all the Subjects of that Empire, were only made capable of such rights and privileges, as the Roman Colonies and such other Towns and Cities anciently had, that were made free; namely, that they might use the same Laws, and be governed by such Magistrates, as the people of Rome had. But the Foundation of the Empire was not so in other people, as it was in the people of Rome; for this was not in the power of the Roman Emperors to grant, who could neither change the rate of the Empire, nor its manner of holding it. Neither did it at all detract from the right of the Citizens of Rome, that their Emperors changed the place of their residence from Rome to Constantinople: For even then was the choice of their Emperours made by such of the Roman Citizens, as were resident at Constantinople, whom Claudian calls the Byzantine Romans: yet so, as that choice was to be confirmed by the whole body of the people of Rome; who like Princes, jealous of their own Sovereignty, always preferred the prerogative of their City, and the honour of their Consuls, (the first whereof did constantly reside at Rome) as the Trophies of their own incommunicable right; wherefore all that right which those Byzantine Romans pretended to have in those Elections, depended wholly on the people of Rome. Nero in the fourteenth of Tacitus his Annals, accuses his Mother for endeavoring to divide the Empire with him, by swearing to her self the Prerogative Bands, and for hoping to put the same reproach upon the Senate and people: Whereas (as Priscus notes.) the Sovereignty of the Roman Empire appertained not to women, but men. For after the death of Hadrianus, it was especially provided, that no woman should ever after be admitted into the Senate, and that he who should do it, should be accursed to God. And it was observed by Tribullus, as a matter of reproach, That Zenobia usurped the Empire, and governed the Common wealth, longer than was fit for a woman to do it. When the Byzantine Romans contrary to the mind and custom of the Romans, had subjected the whole Empire the Emperors Iran, they devoutly revoked that Grant, which they had either expressly or tacitly given them, and by their own power chose Charles the Great Emperor; which they publicly declared by their chief Citizen, the Bishop of Rome: For so also was the High Priest among the Jews always accounted, during the vacancy of their Kings. Now Charles the Emperor and his Successors did always very prudently distinguish between the right they had to the Kingdoms of the Franks and Lombards, and the right they had to the Empire; the former being their Ancient Inheritance, the latter being enfranchised upon him upon a new account: but afterwards the Kingdom of the Franks being divided into the Western, which is now called France, and the Eastern, which is Germany or Almain, seeing that the Oriental Franks did then begin to fret over themselves Kings by Election, (for even at that time the succession to the Kingdom of the Franks, being as it were Aquatrical, depended not so much upon any certain Law, as upon the choice of the people:) The Romans that they might enjoy a most affured protection, chose not a King of their own, but him whom the Germans had admitted for their Emperor; yet still reserving unto themselves, the right of either approving or rejecting him, so far as concerned their own affairs.

And this approbation is in their name solemnly witnessed by their chief Citizen the Bishop.
shop, by a peculiar Coronation. Wherefore as he that is admitted or elected by the seven Princes of Germany, being the Representatives of the whole Nation, hath according to their custom the belt title to the Empire: So is the same person by the approbation of the people of Rome, made King or Emperour of the Romans, or as Historians sometimes call him, King of Italy. As in the excommunication of the Emperour Henry, the Pope makes expres mention of the Kingdoms of Germany and Italy; and in the Oath that the Pope administered unto the Emperour Otto (as Gratian records) the Emperor swears, That he will make no Decree or Ordinance concerning any thing belonging to the Pope or to the Romans without his Council. So that the Emperour under the Title of being King of the Romans, hath a right unto all that did formerly belong unto the Roman Empire, that hath not been otherwise alienated or granted away, either by agreement, or by occupancy, upon a presumption of being deferted, or by the right of Conquest. From whence it is an easy matter to determine, by what right the Bishop of Rome in the vacancy delivers to the succeeding Emperour, the ornaments of the Roman Empire; namely, because at such time, the people being free, the Primacy belongs to him. And it is usual for Bodies Politick, to dispatch all their affairs by the chief person, in the name of the whole. So that as the Prince Palatine and the Duke of Saxony do deliver the Royal Diadem to the Emperour Elect, thereby giving him possession of the German Empire: So doth the Bishop of Rome in the name of all the Romans give unto the same person being by them approved, the ornaments of the Roman Empire. So it is also in Poland, the Arch-Bishop of Gnesen during the vacancy, sits on the Royal Throne, and administers the publick affairs of the Kingdom, as being of all the Orders, the chief. Neither is it much amiss, what Cyprian and Rainerius have delivered unto us, That if the Emperour either by Sicknes or by Captivity be disabled to perform his duty, it is in the power of the Roman people to appoint a Deputy or Vice-Roy in his room.

That the person of the Heir succeeding to the person deceased, is sufficient to preserve the propriety in any thing, either private or publick, is of undoubted right.

But how far forth the Conquerour shall succeed to the conquered, when we come to treat of the effects of War, shall be explained.
CHAP. X.

What Obligation ariseth from Dominion.

I. The obligation to restore that which is another's, from whence, and what manner of Obligation it is.

II. An obligation to restore the profits of what is another's: this proved by many examples.

III. He that makes use of what is another's, thinking it to be his own, is not bound to restitution, if the thing perish.

IV. Yet is the same person bound to restore the fruits in being.

V. Ten, and those that are spent, unless it appear that otherwise he had not spent them:

VI. But not those that he neglected to gather:

VII. Nor those that he hath given away to others; this explained by a distinction.

VIII. Nor if he sell only what he bought, explained by a like distinction.

X. When he that beneficially buys of one man what is really another's, may reserve the price, or part of it.

X. Another man's Goods being bought cannot be restored to him that sold them, but to the right Owner.

XI. He that is possessed of a thing, that no man can justly claim, is not bound to yield it up to any.

XII. What is received, being due, though for some bad cause or otherwise, is not to be restored naturally.

XIII. The opinion, That what consists in number, weight or measure, may be alienated, without the Consent of the Owner, refuted.

Having thus sufficiently, as to our purpose, unfolded what Right or Dominion we may have over things or persons, let us now consider, What obligation lyes against us upon this account. Now this ariseth either out of things extant (wherein also I include persons, if profitable unto us), or out of things not yet extant. Out of things, or persons appearing, there naturally ariseth this obligation, That he that hath in his power, that which of right, is mine, should endeavour (as much as in him lyes) that it may be restored unto me. Among other Precepts of the Law given to the Jews, this is one, That things found should be restored to their right Owner: which is grounded as well upon Natural Equity, as upon that in Deuteronomy, where we read thus, Thou shalt not see thy Brother's Ox or his Ass go astray, and hide thy self from them, but thou shalt in any wise bring it home again unto thy Brother, &c. Many there are (faith Hierom) who think that what they find, though of another man's, they may keep without offence; that say, Deo mihi dedit, cui habeo reddere? God hath given it me, to whom shall I restore it? But let them know, faith he is, it is a sin next to that of Theft, not to restore what we have found. So likewise St. Augulfine, Si quid inventifi & non reddidisti, rapuisti; if what thou hast found, thou restore not, thou hast robbed thy neighbour. And in another place he tells us, That so long as a man enjoys that, which he knows not to belong to another, he may be honest; for his Ignorance is the cause of his detention: but being once convinced of his error, then if he restore not, he may justly be reputed an Usurper. As for my part, faith Bellararius, I make but little difference between him that knowingly detained what is another man's, and him that is a Thief or a Robber; Pari loco haben, res alienas non reddendum, cum raptore. Yet doth this obligation reach no farther, than as far as in us lyes; for no man is bound to impossibilities, nor to restore any thing that is lost at his own charge: but to declare his knowledge to the right Owner, that so if he pleate, he may recover them. For as there is an equality to be observ'd, where any thing is held in common, that it may be made use of by no less by one than another; So Dominion being once admitted, this is mutually agreed on between the Proprietors, That if a man be possesse of another man's Goods, he should restore them to their right Owner. Now if this obligation extended no farther than to restore upon demand, it would both too much weaken the future property, and aggravate the charge of keeping the thing lost. Neither is it in this place regarded, whether a man hath got the possession of another man's Goods honestly or dishonestly: For there is one manner of obligation arising from the crime, and another arising from the thing held and detained by that crime. The Lactae dominiones thought they had expiated the Injury done to the Thebans, by laying an heavy Fine upon Phobidaus, who contrary to the League between them and the Thebans, had possesse himself of the Cadmean Fort, though they restored it not. But (as Plutarch obserues) all Grace flood amazed at their Injustice, Quod eipsum Facinorum Artiemur penna afficitur, Facinus tumen reipsum approbatur; In that they punished the offender, yet in effect justified his offence. The like we may read of Bajazet recorded by Leuculeus: The former, Plutarch attributes
attributes to the advice of Agrippius, who persuaded the City, to transfer the blame upon him, but to preserve the Fort to themselves. But this kind of injustice being singular, is unfually, as Xenophon notes, punished by the special Providence of God. Thus were M. Cærianus and Qu. Hortenius much blamed by Cicero, for detaining part of an Inheritance which was got by a Testament that was forged, though not by any fault of theirs. But because this obligation as by an universal Contract binds all men, and creates a certain right to the Owner of the thing, hence it comes to pass, that all singular Contracts, as being post-nate, do from hence receive their exception, which seems to illustrate that of Tryphonimus: A Thief delivers that whereof he hath robbed me, to Sejus to keep for him, who is altogether ignorant of the theft. Now the Question is, To whom is Sejus bound to restore it? If we look only to the Giver and Receiver, it is just that the thing intrusted, should be restored to him that gave it. But if we reflect the equity of the matter, which takes in all the persons concerned, it ought to be restored double to me, from whom it was fraudulently taken. Whereunto he adds, Et proba hace Juslatinum, quaximum ciscere sua tributis, aut non distributum quibus persona injuste repelat; and this I approve of to be Justice, which so gives to every man his own, that it be not withheld from the juster claim of any other person that hath a right unto it. Now his mult needs be the jufter title, that claims by a right as ancient as propriety it self: Whence it likewise follows, That he that ignorantly accepts of that from another in trust, which afterwards he knows to be his own, cannot be bound to restore it. And the case which the fame Tryphonimus puts, concerning Goods deposited by him whole whole Esteate was before conficrate, is better determined by this rule, than by that which he there produceth, concerning the profits gained by punishments. For if we look strictly to the nature of the propriety, in matters not whether it ariseth from the Law of Nations, or from the Civil Law; for either way it carries with it all things natural unto it itself, whereof this is one, That every person being possessor of another mans goods, is bound to make restitution thereof to the right Owner. And this is the meaning of Maritinius, where he tells us, that Goods may by personal actions at Law be required from thowe, who without any just caufe are possessor of them. And from hence also Springs that in Ulpian, He that finds what is anothers, is so strictly bound to restore it, that he cannot so much as require a reward for the finding of it; but he is to restore it with its fruits, if any be, having only to himself his reasnable charges.

Of things not extant the Law of Nations run thus, That if another be enriched by that which is mine, I not enjoying mine own, he flands obliged to restore to me so much, as he is made the richer by what is mine: Because as to that which he hath gained by what is mine, he hath the more, and I for want of what is mine own, have the less, by so much as he hath gained. For dominion was therefore generally agreed on, that every man according to his proportion, shoulde enjoy his own. Contra naturam est, ex hominis Incommodo sium angere Commodum; For one man to enrich himself by that, which is another man's loss, is unnatural, saith Cicero. And in another place, That we should build up our own Power, Fortunes or Wealth, upon the ruine of others mens, nature it self will not permit. There is so much of natural recht in this saying, that the Lawyers are enforced to decline the prescript Rules of their Laws, and to determine many Cases by this of equity, as being the most convincing. A Contract made by a Servant, being a Factor, shall bind his Master, unless Proclamation be first made, that no credit shall be given unto him. But yet, although such Proclamation be made, if that Servant makes any profit thereby, either to himself, or puts it to his Masters account, it shall be judged a Fraud; Videtur omnibus domic facere, qui ex aliena judicia lucrum quaerat: For he seems to deal deceitfully, that makes himself rich by another mans loss. Where the words Dolus malus signifie whatsoever is repugnant to natural right and equity. If a Wife shall give unto her Husband money, which by the Law, she may require of him again, the Wife shall have either a personal Action against her Husband, or shall relieve her self by that which was bought with her money: Because it cannot be denied, but that the Husband is made the richer by it; and therefore enquiry shall be made, what he possesth that was bought with her money. So again, if thou haft spent or otherwise disposed of money, which my Servant hath stoln from me, concerning it to be his; I have a good Action against thee, for this reason, because my Goods came into thy posseffion without any just caufe. Pupils, according to the Roman Laws, are not bound to pay what they borrow; yet if it appear, that they are the richer by what they borrowed, an Action shall lye against them. So likewise, if thou contractest with my debtor, not as mine, but supposing him to be another mans, and borrowest my money of him, Thou standest bound to pay me; not because I trusted thee with my money, (which could not be without mutual Consent) but because my money coming into thy posseffion, it is both just and righteous, that thou shouldest restore it to me, as to the right Owner.

Our modern Lawyers do prudently judge of other the like Cases by these, as namely, that he whose Goods, whilst he lay concealed had been fold, when he might have had an exception.
exception should be admitted to receive the money that was raised by the sale of them. And that he that accommodates the Father with money for his Son's maintenance, if the Father be not able to discharge the debt, should have his Action against the Son, if he enjoy any Goods that were his Mothers. These two Rules being thoroughly understood, may guide us to give satisfaction in such Cases of Confidence, as are usually by as well Lawyers as Divines, proposed.

For in the first place it hence appears, That he that is possessor of what is another's, yet thinks it to be his own, is not bound to make any restitution, if the thing it fell to possessor do perish; because he hath neither the thing it fell, nor any gains by it. But he that knowingly possesseth what is another's, is bound not only by reason of the thing it fell, but for his fault in detaining it.

Secondly, He that through Ignorance possesseth another's right, is bound to restore not only the thing, but the fruits of the thing that are extant: The fruits, I say, of the thing, but not the fruits of his own labours. For though without the thing, those fruits could not be perceived, yet are they not due to the thing itself, which without his labour could not have produced them. Now the ground of this obligation ariseth from propriety; for he that is the Owner of the thing, is naturally the Owner of the Fruits arising from the thing.

Thirdly, He that unknowingly possesseth another mans Goods, is bound to make restitution both of the thing, and of the fruits that are spent, if it appear that he must otherwise have spent as much of what was his own; because he is by that so much the richer. This Sentence highly commends in Caligula, That those whom he restored to their Kingdoms, he likewise restored to their Fruits and Profits of them for half the time they spent.

Fourthly, That he is not bound to make good that which he neglected to perceive; because he neither hath the thing it fell, nor any thing that succeeds in the place of it.

Fifthly, If such a possessor shall give to another that which was given to him, he is not bound to restore it, unless in case he had not given that, he must have given as much other ways; by sparing which, he is so much the richer.

Sixthly, If he fell the thing that he bought is not obliged, unless it be for the overplus of the price it was bought for: But if he fell the thing that was given, he is bound to restore the price, unless he have prodigiously spent it, which had it not been so given, he had not so spent.

Seventhly, That another mans goods, though bona fide bought, must be restored: neither may the price given for them be required from the Owner; unto which rule, we think it not amiss to add this exception, unless it be where the Proprietor could not probably recover the possession of what was his, without some charges; as when things are lost by Pyrates. For in this case, what the Owner would willingly have spent to have recovered his Goods, may be deducted by him that delivers them. For the very regaining of the possession being not to be done without charge and difficulty, is accordingly to be valued; which charge and trouble being saved, the right Owner (having thus lost his thing) is reputed by so much the richer. And therefore since the buying this thing in the ordinary judgement of the Law be of no value; yet as Paulus the Lawyer's faith, It is valuable, if from the beginning it be agreed, that the possession of what is ours (being at present in another man's power) may be bought. And where things so bought, are strictly required by the Owner without any moderate allowance, though it may stand with the Rigour of the Law, yet hath this Rigour so much of Injustice in it, as the one is a gainer by the others loss. Nor do I here require, that the thing should be bought with an intent to restore it to the Owner. In which case, that an Action of Negotiation may arise, as there are some that affirm, so there are others that deny. For such an Action ariseth from the Civil Law. Neither hath it any of those grounds or principles, whereupon Nature introduceth this obligation. Not much unlike is that which Dopian relates of Funereal charges, wherein a prudent Judge doth not always walk by the same rule, as in more actions of Negotiation, but gives himself a looser Rein which the nature of such an Action will very well bear. And that which the same Dopian in another place faith, If any man mishap his mine affairs, not so much regarding me, as his own profit, and shall dilapse money, in so doing he shall recover by his Action, not according to what he laid out, but according to the benefit that I receive by it. So the Owners of such Goods, as in a Tempest to secure the reef, are call'd over-board, shall recover a part of their losses from those whose Goods remain entire: because he whose Goods are so preferred by the loss of mine, is by my damage made the richer.

Eighthly,
Eighthly, He that buys another man's Goods, cannot restore them back to him that sold them, to recover the price he paid for them; because as soon as those goods did come under his power (as we said already) the obligation began to restore them to the right Owner.

Ninthly, He that is possess'd of a thing, and is ignorant whose it is, is not by the Law of Nature bound to give it to the poor; though it be very pious so to do, and in many places is well ordered to be so disposed: the reason is, because by the Right of Property, no man can claim an interest in it, but the Proprietor. But to him that is ignorant who that is, it is all one as if it had none. For, De non entibus & non apperentibus cadaent eae ratio; Of things that are not, and of things that appear not, there is the same reason, as to him to whom they appear not.

Tenthly, By the Law of Nature whatsoever is received, which another is bound to pay, be the ground of that Obligation honest or dishonest, is not to be restored; although even this also be introduced by some Laws, and that not without cause. The reason whereof is, because in respect of the thing it self, no man is obliged to restitution, unless that thing belong to another man. But in this case, he that was the right Owner before, hath willingly transferred his right to another. But it will be another thing, where the manner of receiving it is vicious, as in the case of Extortion. For this is another kind of Obligation, whereof we discourse not at present.

Neither is that true, which is delivered by Medina, namely, that the property of other men's Goods may come unto us without the Owners consent, in case they are such things as are usually valued by weight, number or measure. For things of this nature may be restored in others of the same kind, which is true, if it be done with consent, or if either by Law or Custom such a Consent may be reasonably presumed; as when we restore what we borrow, or when the thing it self being spent or consumed, we restore the like, in quantity and quality. But without such a Consent, either expressed or presumed, and setting aside cases of necessity, this giving of one thing for another is not to be allowed of.
Of Promises.

I. That Naturally a Right may arise from Promises: The contrary opinion refuted.
II. A bare assertion obligeth not.
III. That Naturally a single Promise obligeth, but from thence no Right accrues to another.
IV. What that Promise is, from whence a Right ariseth to another.
V. Error, It is required that the Promiser have the use of Reason. The Law of Nature distinguisheth from the Civil Law, about Minor.
VI. A Promise made through Error, whether it obligeth Naturally, and how far.
VII. A Promise made out of Fear bound, yet is he that caused that Fear bound to retreat the Promiser.
VIII. That the Promise be valid, it ought to be in the power of the Promiser to fulfill it.
IX. Whether a Promise made for something that conditions do Naturally oblige, explained by definition.
X. What we are to judge of a Promise made to gain something that was before due.
XI. The Form of a firm Promise.
XII. The manner how a Promise may be validly made by others: Where also it is difficult that of Embassadours, exceeding their Commissioners.
XIII. Matters of Ships and Factors, how far they are oblige by the Law of Nature: Where also is observed the Error of the Roman Law.
XIV. To make a Promise valid, Acceptation in him, to whom the Promise is made, it requireth.
XV. Whether this Acceptation ought to be certified to the Promiser, explained by definition.
XVI. A Promise may be revoked, the person to whom the Promise is made, dying before its acceptance.
XVII. Whether it be revocable, the person dying, by whom the Promiser was sent, explained by definition.
XVIII. Whether a Promise be revocable, being accepted by another, explained by a definition.
XIX. In what time a Charge may be added to a Promise.
XX. How a weak Promise may be made firm and valid.
XXI. A Promise made without cause is not naturally void.
XXII. A Promise made for the Fait of another, how far it obligeth Naturally.

By our Method formerly designed, we are now to treat of obligations made by Promiser; where we find Francis Commars, a man eminently learned, opposing us, who holds, That those Promises that are not made for a valuable consideration, oblige not, either by the Law of Nature or Nations. And yet he confesteth, That they might justly be performed, in case the thing promis'd be such as might justly and honestly be fulfill'd, though no such Promiser had been made. To confirm which opinion, he produceth not only the testimonies of some Lawyers, but these Reasons also: First, That he who believes every rash Promiser cautiousley made, is no less to be blamed than he that believes none at all. Secondly, That it would endanger most mens Fortunes, were men bound to perform all their Promises, which for the most part are made more out of ostentation, than a premised Will and Purpose to fulfill them. Lastly, That it is fit that some things should be left to every mans honesty, and not to reduce all Promises to a necessity of Performance. And whereas it is said, That it is difficult not to perform what we have promised, the meaning is not that it is unjust, but that it argues lightness and inconstancy in the Promiser. Thus pleads Commars, urging besides the Testimony of Cicero, who denies that those promises are to be performed, which are to them to whom they are made, unprofitable; or that infer more damage to him that made them, than benefit to them to whom they are made. But yet in case the matter be not entire, (something having been performed by the one party) then he would have the other party obliged, not unto all that was promis'd, but unto that only that is in difference between them: And for those agreements that of themselves are not binding, they receive their obliging power, either from the Contract wherein they are, or whereunto they are adjoynd, or from the delivery of the thing; From whence arise partly Actions, partly Exceptions, and prohibited Reclaims. But as to those that may have their obligatory power according to the Laws, as these made by stipulation, with some others, they receive their binding faculty from the benefit of the Laws, whose efficacy is such as to make that which in it self is only honest, to be even
even necessary. But this opinion of \textit{Communs}, taken so generally as he seems to express it, cannot be current: for in the first place it would thence follow, That those Articles of Agreement that are made between Kings, and between the people of diverse Nations, so long as nothing was on either side performed, were of no force; especially, in such places where we are not Forms of Leagues or Sponisons found. Besides, no Reason can possibly be given why Laws (which are but as it were so many common Covenants or Promises of the people, for so both \textit{Arifolot} and \textit{Democritus} term them) should add such an obliging force unto Agreements. And yet that every man's own Will endeavouring by all means to oblige it self, cannot do the same thing, especially where the Civil Law gives no restraint or impediment unto it. Whereunto add, That the Dominion of a thing may be transferred by the Will being sufficiently declared: And why therefore may not the Will have the same Right over a person, either to transfer Dominion (which Right is less than Dominion it self) or to do something, seeing that we have the same power over our Actions, as we have over our Goods? And herein likewise we have the content of the learned. Nay, the \textit{Hebrews} hold that where the thing conforted about, will not admit of delay, our Silence is equivalent to a Sponison. For as the Lawyers say, No Title can be naturally more assured, than that which the Proprietor doth willingly transfer to another: in the same manner it is said there is nothing so fit to preverse faithful dealing among men, as to observe and perform whatsoever is promised and agreed upon between themselves. So a Decree for the payment of Money promised, though there were no other reason aligned why it should be due, but the free consent of him that promised it, is said to be agreeable to Natural equity. \textit{He} faith \textit{Paulus} the Lawyer, doth naturally owe, and by the Law of Nations must give, upon whole word and promise we have relied: Where in the first place we must observe, That this word [\textit{opert} \textit{Muss}] implies a kind of necessity: Neither may we admit of that which \textit{Communs} takes as granted, That we are then said to rely upon a man's faith, when the thing ceaseth to be entire (that is, when something is already performed by one party.) For \textit{Paulus} in that place of treat a personal Action brought for a thing not due, which presently ceasest as soon as something (upon what agreement ever) is paid: Becaufe, even before, when nothing was as yet performed on either side, by the Laws of Nature and Nations, what was promised, ought to be given: although the Civil Law, to prevent the occasions of unnecessary suits, do give little or no encouragement to exact it. But \textit{Tully} in his Offices attributes so great a power to Promises, that he makes Faithfulness to be the very foundation of Justice; which \textit{Horace} also calls the Sister of Justice: As the \textit{Platons} also do off- times express Justice by \textit{dharmos}. Truth: Which \textit{Apuileus} renders by the word Fidelity: And \textit{Simeonides} calls it Justice, not only to restore what we have received, but even to speak Truth, (that is, to perform what we have promised.) But to clear this yet better, we must carefully distinguish between the three degrees of speaking concerning things to come, which either are, or at least are reputed to be hercetare in our own power.

The first consits in a bare affirmation of what we project for the future, things thus standing, and in the same mind we now are: And hereunto it is required, that we speak sincerely, and without guile, what at that present time we think: But not with any resolution to continue in that thought, if the face of things change, or if other chances happen, which we then foresee not, yet may afterwards incline us. For the mind of man hath not only a Natural Power, but a Right and Freedom to alter its counsels; and if there be any weakness or error in the change, as it often happens, that is not infringick to the matter, but to the matter, in that we change from the better to the worse.

The Second degree is when the Will confines it self for the time to come, giving some sign whereby the necessity of its perseverance is sufficiently declared, and this may be called a Pollicitation, or a Promise; which setting aside the Civil Law obligeth either absolutely, or under some condition, yet gives no peculiar Right to another. For in many cases it happens, that there may be an obligation within our selves when there is no Right given to another, as may appear by those debts of mercy and gratitude, whereunto we may refer those of Confiancy and Fidelity; and therefore no man can by the Law of Nature require the thing promised from the right owner by virtue of such a Pollicitation, nor can the Promiser be compelled by that Law to perform what he hath so promised.

Thirdly, When the Will to the confinement adds some outward sign whereby its consent to transfer its own proper Right to another is sufficiently declared: Which is a compleat Promise, as having the like effect to the alienation of a mans Property. For it is the way to alienate a thing, or, at least, the alienation of some part of our Liberty or Freedom. Unto the former belongs our Promises to give, unto the latter our Promises to do something. And hereof the Scriptures do give us a notable
Nch. 9. 8. 
1 Cor. 1. 19. 
10. 15. 
Prov. 6. 1. 

Stipulatorus & 
Sponsoris fequimur 
Promifes are 
made with 
solemnity. 

Numb. 30. 4. 
5. 6. 

Vox nulla 
nulla 

Sent. lib. 2. 
it. 14. 

De Promisse 
non Specio; 
jam non 
promitent de 
the fact 
dest Seneca 
Ep. 19. 

Rash Promises 
bind nor. 

V. 

To make 
Promises 
complete, the use 
of Reason is 
required in 
the Promiser. 

VI. 

A Promise 
made 
through er-
ror, how fr 
Natural it: 
obligeth. 

Of Promises. 

BOOK II. 

Table example, where they tell us, That God himself, who cannot be bound by any Law; yet professedly it to be contrary to his own Nature, not to perform what he promised, Heb. 6. 17, 18. From whence it is plain, That to perform our Promises is a duty springing from the Nature of Immutable Justice; which as it is in God, so is it in some measure, common to all such as have the use of right Reason. Let us hear the opinion of Solomon in this case; *My Son, if thou hast been fury to thy Friend, thou hast given thy Faith to a stranger; or (as the Septuagint translate it) to thine Enemy: Thou art ensnared by the words of thy mouth; Thou art taken and bound by thine own Speech.* Whereunto may be added that of Thales the Philosopher, *Sponde nosse profet effe; Engage freely, and thou art not far from harm.* And that of Cicero, *Sponsos non desit iudicium; Engagements are fel prmatione are last.* Hence it is, that the Jews term a Promise, *Vexillum,* a Banner, which also in the Scriptures is compared to a *Vow;* as if by Vows and Promises we did contract (as it were) with God himself. From the same Root ariseth the Greek word *vjavgon,* which likewise signifies a Promise, namely, from *xwv,* which signifies *To have or to hold,* Because he to whom any thing is promised, doth hold fast, and, as it were, bind the Promiser. These things promis’d, *Connum!* his Arguments are easily an-
fwered; For what the Lawyer lays, *De nudo pacto non est activum;* A bare Promise will be 
nor Action; hath respect only to what was introduced by the Roman Laws, which made 
Satisfaction to be an infallible sign of a deliberate mind. *Paulus* the Lawyer speaks 
very wary of such Promises, *If (faith he) we make a bare Promise to pay no, it avail 
nothing; for among Roman Citizens no Action ariseth from a bare Promise.* The like Laws 
we grant to be in force among other Nations, *Quae lex ad prae反腐倡men,* *nos quod aliquo 
promisimus, obligat.* What Law (faith Seneca) binds us to perform all our Promises? Where he 
peaks of humane Laws and of rash and inconfiderate Promises. But if we respect the Law 
of Nature only, there may be other signs of a mind perfectly resolv’d, besides that which the 
Roman introduced by Satisfication, or if there be any other such like, which the Civil Law 
requires to beget an Action. But as to that Promise which is made rashly, and with- 
out due consideration, neither do we admit it to have any obliging power, as *Theobal- 
diolum* hath well obser’d. Yea, and as to that which is deliberately done, but not with 
a purpose thereby to transfer our own Right to another, we deny that from thence 
there ariseth Naturally a Right to any man to exact the performance of it. Al- 
though we do acknowledge, That from such a Promise there may arise an obligation, 
not in honesty alone, but in a moral necessity to do it. And as to that of *Cicero* we 
shall treat hereafter, when we shall difcourse of the manner how Contrats are to be 
understood. But now let us fee what Conditions are required to make a Promise 
valid. 

And in the first place it is requisite that he that promiseth should be endued with 
Reason, which renders the Promises of Mad-men, Idiots, and Infants void, and of 
no force; but the case of Minors is somewhat different: For although they are believed 
to be but of weak judgement, as Women also are; yet neither is this weakness of Judgement 
lafting, nor is it of itself sufficient to invalid their acts. At what years a young man or 
woman arrives at the use of Reason cannot certainly be determined, but must be gue-
sed at, either by their daily Actions, or by the Customs of every Nation: Among 
the Jews, a young man after thirteen years of age might oblige himself by any solemn 
Promise he should make, and a young woman after twelve. But the Civil Laws, upon 
better reason, thought good to make void many of their Promises, not only among the 
Romans, but among the Graecians. And against some they introduced the benefit of 
Restitution: But these are the peculiar effects of the Civil Law, and do no whit appen- 
to the Laws either of Nature or Nations; except only in this, that where they are 
received, it is agreeable to Nature that they should be oblig’d. Infomuch that if a 
Foreigner shall contract with a Citizen, he shall be bound up by the Laws of that City, 
as if he were, for that time, a Subject of that Nation. But it were otherwise in Sale 
such a Contract were made either on the Seas, or in some defart Island, or by Let-
ters between two perfons inhabiting dierere Nations. For then such Agreements should 
be regulated by the Law of Nature only, as are the Agreements made between such as 
are invested with the Supreme Power, as they are such: For in these, what they do pri-
ately, may by their Laws be made void, when it is done in favour to those powers, 
but not when done to their Punishment. 

Concerning a Promise made by an error or mistake in the person promising, the que-
tion is yet more difficult. For we are to distinguish between that Error which is about 
the substance of the thing promis’d, and that which concerns not the substance; and then 
we are to consider whether the Fraud gave occasion to the Promise or not. Again, whe-
ther he with whom we have to do be guilty of the Fraud or not. And lastly, Whether the 
Act be strictly due, or binds only in Honesty and Confidence. For the opinions of 
Lawyers do vary according to the variety of these cases, declaring some acts to be void 
and
and others valid. But fo, that according to his will and pleasure that is injured, the promise may be either revoked or reformed. But most of these dilutions proceed from the Roman Law's; as well from the old Civil Law, as from the Preterian: And some of them are either not altogether true, or not well digested. But yet it sufficeth to chalk out a way for us to find out the natural truth; for as concerning the force and efficacy of Laws, this hath ever been allowed of by the general consent of almost all Nations, That when a Law is enacted upon the presupposition of such a Fact as was not really so done as was загадан, and believed, that Law is not obliging, because the truth of the Fact failing, the foundation of that Law faieth with it. But when a Law is grounded upon such a presupposition, may be gathered from the matter of that Law, from the Words, and from other Circumstances. The like may be said in this case, if a Promise be made upon the belief of such a Fact as indeed was not done, that Promise naturally is of no force; because the Promise did not give his consent absolutely to the thing promised, but upon such a condition (if not expressly, yet implied) as really was not: As in that case mentioned by Cesaro, of him falsely believing his own Son to be dead, appointed a stranger to be his heir. And yet in case the Promiser were negligent, either in his diligence to examine and search out the truth of his Sons death, or in his care of expressing his own fente, and did thereby occasion any damage to the person to whom he made that Promise, he shall be obliged to repair it: Not upon the account of his Promise made, but for the damage, which through his neglect, was sustained by him to whom it was made; whereas we shall speak more anon. But if there were an error or mistake in the person promising, and yet that Error was not the cause of the Promise made, the act shall be valid, because there was nothing wanting of a true consent; But if in this case also the person to whom the Promise was made, did by any fraud of his, directly or indirectly, occasion that error, what damage soever shall accrue to the Promiser by reason of that Error, shall be by him repaired. But if the Promise were but in part occasioned by an Error, then as to the other part the Promise shall (stand good).

Concerning those Promises that are made through Fear, questions do arise no lefs perplex. For herein they do usually distinguish of Fears, which are either great and vehement, or light and slender: If great, then they consider whether it be so absolute, or in respect only of the person fearing: Then whether it be occasioned justly or unjustly; and whether by him to whom the Promise was made, or by some other: As also they distinguish of the Acts, whether free and generous, or grievous and burdensome; and according to this diversity, are some Acts laid to be void, others revocable at the pleasure of the Promiser, and others to be wholly renewed. Concerning every one of these cases, there are great differences in opinions. But I do wholly incline to those who hold, That setting aside that Authority of the Civil Law, which sometimes takes away, and sometimes moderates the binding power of such promises: He that promises any thing through Fear, is obliged to perform what he hath so promised; because the consent he gave was not conditional, as in the case of Error, but absolute. For as Aristotle well observes, He that for fear of being shipwrecked, throws his goods overboard, would willingly preserve them on condition that he might not be wrecked; but upon a serious consideration of the present danger he is in, he absolutely resolves that his goods rather than himself, shall perish. But yet we must also crave this allowance, That if he to whom the Promise was made, did occasion not a just, but an unjust Fear, though but slight; and that thereupon the Promise was so made, he is bound to discharge the Promiser if he desire it: Not that the Promise is in it self void, but for the damage that he sustained who made it, by reason of the injury done him. But what exception the Law of Nations admits herein, shall in its proper place be hereafter explained. But that some Acts are rescinded, which were made through Fear, being occasioned not by him with whom we have to do, but by another, is an effect of the Civil Law, which doth often either null or revoke Acts, though freely done, if they that do them be of weak Judgment. Seneca argues according to the Law of Nature, when he tells us, That whatsoever either Fear or Fear or Necessity makes us to grant, may be revoked, if that Fear or Necessity be imposed on us by whom the grant is made. But what, faith he, is that to me, what shall be completed, or necessitated to do, if not by me? Meam culpam oportet esse, mea pecunia sit; It is necessary that the Fault should be mine own, if the Punishment be so. Now what we have before said concerning the force and efficacy of the Civil Law, were not amiss to be here repeated: But what force or strength Oaths do add unto Promises to confirm them, shall be shewed anon.

Again, That a Promise may be strong and binding, it is necessary, That the thing promised either now is, or hereafter may be in the power of the Promiser. Wherefore in the first place, we may be sure, That no Promise can bind us to that which is in itself unlawful: For, Id potius quid jure potiamus; That only we can do, which we can X do,

VII. A Promise made through fear oblieg'd.

Eth. N. 3.

VIII. What is promised ought to be in the power of the Promiser.
do, which we can lawfully do. All promises receive their vigor from his Right; that makes them, beyond which they are of no force. Agelesians being once challenged upon his promise, answered, Bene fijum fit, feu minus dixi tantum, non & promis; Te do well toifle it, if what I promised were just; but if not, I only said it but did not promise it. But if the thing promised be not now in our power, but may be, then doth the strength of that Promise hang in suspense; because the Promise was but conditional, namely, if at any time it shall lie in my power. But if that condition whereby the thing may be in our power, be also in our power, then is he that made the Promise, obliged to do whatsoever, is morally fit, that his Promise may be fulfilled. But the Civil Law nulls many Promises of this kind also for profit, which the Law of Nature would bind us unto: As when a man or woman shall promise to marry another hereafter, being now already married: And not a few other Promises made by Minors and Children, whilst under their Parents tuition.

But here it may be demanded, Whether a Promise for the performance of an act in itself vicious, doth naturally oblige: As if a man should Promise a Reward to him that should kill another. That this is a wicked Promise doth sufficiently appear by this, That it was made to excite a man to do a wicked Act. But yet not every thing that is viciously done, doth lose the effect of a just Right, as is manifest in things prodigally given, wherein notwithstanding there is this difference, That so soon as the gift is prodigally given, the obliquity cealeth: For the gift contracts no soil from the giver, and therefore it may without sin be polleft by tho: whom it is given. But in Promises made to a vicious end, the vice remains so long till the crime be perpetrated: For so long the very fulfilling of the Promise being an incentive to vice, must needs be sinful; which begins to cease, when the crime is committed. Whence we may conclude, that the force and efficacy of such a Promise until that time did hang in suspense, as I said before, concerning the thing promised, being not in our own power. But the crime being done, then the obligation arising from that promise breaks forth, which from the beginning was not intrinsically wanting, but hindered by a vice that was accidental. An example hereof we have in Judah the Son of Jacob, who performed his Promise unto Thamar, whom he dealt with as with an Harlot, by sending her the reward which by the Law of Nature, then in force, was due unto her. Though it be otherwise by the Civil Law, as may appear by the sentence which C. Aquilius past in the like cafe. But in case that Promise were occasioned by the fraud or injustice of the person to whom it was made, or if it were made upon any unequal terms or conditions, how it is to be rectified, is another Question, whereof we shall speak anon.

But when any Promise is made for some cause formerly due, it is not thereby the less due, if we look unto Natural Right, according to what we have already said concerning our acceptance of that which is anothers: Because Promises are Naturally debts, though there be no cause preceding; but here also, if any damage accrue by extortion, or if there be any inequality in the agreement made, that damage is to be repaired, according to such Rules as shall be let down anon.

Now as to what appertains to the manner of promising, it requires, as I said before, concerning the Alienation of Dominion, some external Act or Sign sufficient to testify the content of the Will which may be done, sometimes by a beck or nod, but is usually done either by voice or writing.

But we may also be bound up by another mans act, if it appear that we have deputed and empowered him to act for us, either as our Instrument in that particular business, or under some general notion or qualification. And it may likewise happen, that where the Commision is to act in general, he that is so commitioned, may oblige us, by acting contrary to his private Instructions: For here are two distinct Acts of the Will, the one whereby we oblige our selves to confirm and ratifie whatsoever our Agent shall do in such a business; the other, whereby we oblige our said Agent, that he shall not act beyond our secret Instructions: This we observe, in relation to those things which Ambassadours do Promise for their Masters, by virtue of their Instructions or Letters of Credence, but exceeding their secret Commands.

From hence also we may conclude, That such Actions as are brought against Masters of Ships and Factors (who have the charge of goods transported by Sea into foreign parts) which are not so much Actions, as qualities of Actions) are grounded upon the very Law of Nature. And here we cannot but note the error of the Roman Laws, which by the fact of the Master do bind every one of the Mariners for and in the whole, which is both repugnant to Natural Equity, which seems to be satisfied if every Mariner be bound for what concerns himself: And also damnable to the Commonwealth; for men would thereby be deterred from Navigating the Seas, fearing to be so criminally, and, as it were, infinitely bound by the fact of the Master. For much;
much, that in Holland, a Country of late famous for Merchandizing, this Roman Law both of old was, and now is of no force: Nay, rather on the contrary, it is decreed, That the Malfet and Mariners in general, shall each of them be bound no farther than to the value of the Ship, and the goods that are therein transported.

But that a Promis should transfer a Right in the thing promised, the acceptance of him to whom it is promised, is no less requisite, than it was in the case afore-said of Alienation: And herein Tertullian in his Book of Falls, speaks like a Civilian, Vadam cum à Dee acceptationum eff. Legem in poferum facit: A Vow, (though freely made, yet) when it is by God accepted, is as binding as a Law. And here also a preceding demand of a thing promised, (if no alteration appear) shall be judged an acceptance. Neither doth that which the Civil Law hath introduced concerning such Promises as are made to Cities hinder this: Which notwithstanding hath so far prevailed with some, that they hold that the sole Act of the Promiser is by the Law of Nature sufficient to transfer a Right: For the Roman Law faith not, That the Promiser is fully compleat, and of force before it be accepted; but that it is not lawful to revoke such a Promis, but that it may be always accepted, which effect is not from the Law of Nature, but merely from the Civil Law. Not much unlike unto that which the Law of Nations is introduced in favour to Infants, Idots and Madmen. For, for these, as the will and purpose of posseffing things that are gained by occupancy, so the will and purpose to accept of things promised creates a Right.

It is also sometimes controverted, Whether to make a Promiser fully effective, it be requisite that the thing promised be not only accepted, but that the acceptance be also made known to the Promiser, before it can obtain its full effect. And certain it is, that either way the Promiser made may be binding: As for Example, either thus. This will I do if it shall be accepted; or thus, This I will do, if I shall understand that it will be accepted. And if the Promiser do imply a mutual obligation on both sides, then it is to be understood in the latter sense. But if the Promiser be free and spontaneus, then it is best to believe that it was meant in the former sense, unless it shall appear otherwise.

Again, Hence it follows, That such a Promiser made before Acceptance (for till then no Right paffeth) may be revoked, without the imputation of either Injustice, yea, or Levity, if it were really so intended, when made. That it should not be of Force, till it were accepted, so till it could transfer no Right. It may also be revoked, in case the person shall dye to whom such a Promiser was made, before he hath accepted of it. Because the Acceptance was referred to his own choice, and not to his heirs. For it is one thing, to be willing to give my Right to such a man, to be by him transferred to his Heirs; and another thing, to be willing to give it unto his Heirs immediately; It is very material to consider on whom we bestow a benefit. Of this opinion was Neraclius, who could not believe a that a Prince would have grants to them whom he had granted unto him, believing him to be alive.

A Promise may also be revoked upon the death of the person who was authorized to make it; because the binding power was in his words: But not so, if the grant be sent by a Messenger or a Carrier, because the obliging power is not in him, but in the Instrument he carries. And therefore those Letters importing the consent of the party may be conveyed by any man. We must also distinguish between him that is deputed only to signify the Promiser we make, and him that is authorized by us to make that Promiser himself. In the former case a revocation shall take place, although it be not so express to him that carries the Promiser or Grant: In the latter case, the revocation itself is of no force; because the obliging power depended upon the Will of him that is sent to make it; who if he do make it while it is in his power fo to do, that is, before the revocation be made known unto him, the grant shall be valid, and the person that made it justified. So also in the former case, though the Donor dye, yet may the gift be accepted, as being so part perfect and compleat, although subject to a revocation: which is apparent in Amballadour. But in the latter case it cannot, because the gift is not actually given, but only commanded to be given. But where the matter will admit of a debate, it may be presumed, that the will of the Prince was, That his Commands should be executed, unless some great alteration should happen in the mean time: As namely, the death of the person commanding. 'Tis true, there may be many conjures that may be of force to persuade us to think otherwise, which may easily be admitted. That so what was in a good cause commanded to be given, may notwithstanding abide with us. And thus may that question that hath been heretofore mutated, be answered, Whether the heir of him that was so commanded, may be sued at Law.
Controversies also do usually happen, concerning the accepting of a thing in the half of another: Wherein also we must distinguish between that Promise that is made to me of something to be given to another, and that promise which is made in the name of him to whom the thing is to be given. If the Promise be made to me (setting aside that Query introduced by the Roman Law, Whether any benefit do accrue unto me by it.) The Right of accepting the thing seems naturally to be given to me, and the power of transferring that Right unto another, if he also will accept thereof; so that he that made the Promise hath no Right in the mean time to revoke it; but I to whom the Promise was made may remit it. For this reason, it is no whit repugnant to the Law of Nature, so is it most agreeable to the words of such a Promiser: Neither can it be said, not at all to concern me. That another by me should receive a benefit. But if the Promiser be made in his name to whom the thing is to be given, we must then enquire, Whether he that accepts of what is promised, hath a Special Command to do, or an order to general, as may be thought sufficient to include it; or whether he hath no such order at all. If it do appear that he hath such order or authority to accept thereof, I do not then conceive it necessary to enquire any further, Whether the person so empowered be a Free-man or not, as is usually done by the Roman Laws; but conclude rather, That the Promiser is fully compleat by that acceptance: For it sufficient to signify our consent, by a Servant, whose will is reputed ours, if we authorize him, and he accept thereof. But if he that accepts of the Promise, have no such order, from him to whom the Promiser is made, but is deputed by the Promiser, then hath the Promiser no power to revoke the Promiser, until he whom it concerns, do either accept thereof, or reject it. Yet so, notwithstanding, That he, who in the mean time, hath accepted of the Promiser made, hath no power to remit it, because he is not deputed to accept of any Right to the thing promised, but to bind the Promiser to observe and perform his Promiser, in fulfilling the thing promised: So that if the Promiser shall retract, he may be said to break his Faith, but he cannot be said to invade any mans Right or Propriety.

By what hath been already said, it may easily be conceived, what we are to judge concerning such a charge as is usually added unto a Promiser. For such a charge may be imposed, as long as the Promiser is not yet made perfect by acceptance, nor the Faith of the Promiser given, that it shall be irrevocable. But yet this charge added for the use and benefit of a third person is also revocable, until it shall be by that third person accepted: Although some there be, that, as well in this, as in other the like questions, are otherwise persuaded. But he that thoroughly considers the matter, will quickly discern so much of natural reason and equity in what hath been said, that he will judge all farther proofs to be needless and superfluous.

It is also sometimes Controversed, How a Promiser occasioned by an error (or mistake) in the Promiser may be made good, if, the truth being known, the Promiser notwithstanding his mistake, be willing to stand to his Promiser. The like question may be put concerning Promises occasioned by fear, force, or the like, when the cause thereof shall afterwards cease, as in the case of Matrimony, and the like. For the confirmation of which Promises, some are of opinion, that nothing is requisite but the internal acts of the mind, which being conjoined with the former external act, sufficeth to contract a firm obligation. Others disallowing this, because they cannot admit that any outward Act should be a competent sign of an internal act subsequent to it, do require a new verbal Promiser and Acceptance. But the middle opinion is the fader, which requires some outward act, but not such as is verbal, seeing that the retaining of the thing promised by the person to whom it was promised, and the relinquishing of it by the person promising, or some such like act, are sufficient to perfect the mutual consent of both parties.

They also must not be omitted, lest we should confound the Civil Law with the Law of Nature: That by the Law of Nature, Promises as well as Gifts may be good and valid, though there be no cause of consideration express, wherefore they were made.

Neither is any man bound by his Promiser that he makes for the fact of another man, to make good all that wherein they differ, so as he omits nothing of that which on his part may be done, to procure that man to do it, unless either the words of the Promiser or the nature of the business do naturally require a stronger obligation. So Livy in the like cafe, He thought himself discharged of his Promiser, forasmuch as he left nothing unattempted that lay in him, to have had it performed.

CHAP.
CHAP. XII.

Of Contracts.

I. The Division of humane Acts unto others profitable: And first of simple and mixt.

II. Simple are either purely liberal, or with mutual obligation.

III. Or into such as are permunatory, as well such as separate the parts.

IV. As those that introduce Community.

V. Those that are mixt are either so principally,

VI. Or by way of Accession.

VII. Which of these Acts are called Contracts.

VIII. In all Contracts there should be an equality, and that first in such Acts as are Praemunatory.

IX. As an equality in knowledge.

X. An equal freedom of Will.

XI. 2. In the very Acts, if it be by way of Exchange.

XII. 3. In the things contracted for, explained.

XIII. That this equality takes place, even in such Acts as are either merely or in part beneficent.

XIV. How things are to be valued, and for what cause the prices are either increased or diminished.

XV. When things are perfectly bought, and when the Dominion is transferred.

XVI. What Monopolies are contrary to the Law of Nature, or Rules of Charity.

XVII. How many receives its function.

XVIII. Of Lands hired, nothing of the Rent is to be abated by reason of the sterility or the like: And if the first Tenant be disabled to use the Land or thing, may it not be let to another.

XIX. How the just hire of men's Labours may be increased or diminished.

XX. By what Law Usury is forbidden.

XXI. What profit falls not under the notion of Usury.

XXII. What the Civil Law determines of Usury.

XXIII. In Contracts, what value we are to put upon the peril we run, in securing the main stock.

XXIV. In social Contracts how the profits are to be proportioned, and of its several kinds.

XXV. Of Naval Confederations.

XXVI. If there be an inequality in the terms agreed upon, as to Acts external, the Law of Nations allows no remedy, and in what sense this is said to be Natural.

Of such humane Acts as are to others profitable, some are simple, others mixt or compounded.

Of those that are Simple, some are Beneficient, others Permunatory: Such as are Beneficient, are either merely gratuitous or infer a mutual obligation: Such as are merely gratuitous, are either present done, or such as extend to the time to come. Those that are present done, are either some fact or deed that yields profit to another, whereof there is no necessity that we should discourse, since though it doth produce profit, yet it hath no effects of Right: Or some donative or free gift, which also is a profitable act and present done, whereby Dominion is transferred, and whereof we have treated above, when we discourse of the acquiring Dominion. Those gratuitous acts that extend to the time to come, are promises, either to give or to do some what, whereof we discourse in the Chapter preceding. Those beneficent Acts which infer mutual obligation, are such as dispoze either of things without alienating them, or of some Fact; yet so, as that some effects remain to another. Such, as to things, is the concessions of the use of them, which is called lending: And as to Facts, the performance of some work that is costly or obligatory, which is called a Mandate or Charge, whereof one species is, something deposited or committed to our trust, as namely, our labour in the keeping of the thing. Now like unto these Acts, are our Promises of these Acts, but that these, as I have already said, do extend to the time to come; which also we would have to be underfoot of these Acts, which are now to be explained.

Of such Acts as do infer Profit by exchange, some divide and dissipate the parts, others unite them, and so introduce Communion: Those which divide and separate the parts, the Roman Lawyers rightly distinguish into those three heads: De ut Des, Facio ut Facias, Facio ut Des. First, when we exchange one thing for another, the agreement runs thus; I'll give you this, if you'll give me that. 2. When we truck Deeds, then it runs thus; I'll do this for you, if you'll do that for me. The 3d. is mixt, as when we agree, That if I do this for you, then you shall give me that as the price or reward of my pains. But the Roman Lawyers do exempt from this Division, some Contracts, which they call Nominati;
Of Contracts.

BOOK II.

But because by reason of their more frequent and ordinary use, they had received some certain force, and were of such a nature, that nothing at all had been particularly said, yet by their very name they might have been sufficiently understood. Hence it was, that to those there were certain set forms of Actions appointed; whereas to others that were less ordinary, that common form was not sufficient: But the plea must be made in a form fitted to the fact, and therefore it was said to be in prescript words. Neither is there any other cause but this of frequent use, why in these nominate compositions, if some things requisite to a Contract were by both parties asent unto: As in the sale of any thing, if the price were on both sides agreed on, yea, though the matter were yet entire, (that is, if there were no mony paid, nor any thing performed on either side) yet was there enjoyed a necessity of fulfilling the Contract on both sides; whereas in Contracts not so frequent, whilst things stood entire, and nothing on either sides performed, there was indulged unto them a liberty to retract, that is to say, they might without any penalty revoke. For the Civil Law restrained all coercive power from such Contracts, and left them wholly to the Faith and Honesty of the Contractors: But the Law of Nature takes no cognizance of these distinctions; for neither are those Contracts which they call Innocimate, either less natural or less ancient. Nay even Barterings, which they reckon among those that are Innocimate, is both more simple and more ancient, than those made by bargain and sale. Thus Tacitus testifies of the Germans, That they used the more simple and ancient way of Traffick, that is, by exchange of Commodities. For as Sercius rightly observed, Our Ancestors did only exchange one thing for another, How much more happy was that Age, faith Flavius, when men exchanged Goods for Goods, the Native Commodities of one Country for those of the growth of another. The like he relates of the Sires, a people of Scythia, Who having exposed their Native Commodities to sale on the farther bank of the River, they take away what they find to be let by it, if they are pledged with the exchange. Which kind of bartering of Commodities is yet in use in some parts of Africa: We therefore taking Nature for our best guide, do reduce all diremptory Contracts (without taking any cognizance of that Roman distinction of Nominate and Innocimate agreements) unto these three heads before named. When we give to receive, we either barter one thing for another, which doubtles was the ancient way of Traffick, or we receive mony for mony, as by Bills of Exchange; or we receive goods for mony, as in the cafe of buying and selling; or we receive the use of a thing for another thing, or the use of one thing for the use of another, or the use of a thing for mony, as in things let and taken to hire. By the use of things we are to understand, not only the bare use of a thing, but also the fruits, profits, or proceeds of it, whether temporary, personal, hereditary, or any other way however limited or circumscrib'd, as among the Hebrews, that was held until the next Jubilee. Some things are given, that after some intervals of time, are to be referr'd either in kind or to the fame value, as in things that are lent; and this kind of Permutation is chiefly used, where the things exchanged do conflict in number, measure, or weight, whether it be mony or other things. The exchange of deeds for deeds do infinitely vary, according to the no les infinitie variety of humane actions. But when we do that we may receive, it is either work done for mony, as when for our daily labour we receive wages; and this also is a kind of letting our selves to hire for profit in our several callings: Or when by our voluntary act, we undertake to secure another mans goods from all calamities or contingent misfortunes, which manner of contracit was hardly known to former ages, though now of frequent use; or when we do somewhat to receive either things, or the use of things for our pains.

But such Acts as are communicatory, do contribute either deeds or things, or on the one side things, and on the others deeds, towards some publick benefit: All which are comprised under the notion of Society or Confederacy, under which also we comprehend that of war, when private men combine together, to equip a Fleet at their own charge, against Pyrates, or againfthuch as invade them, and such a combination is vulgarly called the Admiralty.

But such Acts as we call mixt, are either principally and originally so, or are made so, by the accession of some other: As if I shall knowingly give more for a thing than it is worth, or than I can buy it for of another, it is a mixt Act, partly a Gift and partly a Buying. So if I do contract with a Goldsmith, for so much mony, to make me so many Kings of his own Gold, it is a mixt Act, for I buy the Gold and hire the Workman. And thus it happens also in Societies, as that one part should contribute deeds and mony, but the other mony only: So likewhile the grant of Land to be held in Fee Farm, is a benefit or a gift, but the binding of him to whom this Grant is made to serve in the wars for our defence, is, factum et factus, to do somewhat for him that he may do somewhat for us: So the Gain, by mony lent to traffick by Sea, is mixt; partly for the loan of my mony, and partly for running the danger of the Sea.

Acts...
Acts are mixt by accision, when we strengthen our own Acts by the Acts of another; as by Sureties, or by delivering Pledges or Holttages: For Surethip, if we respect only the matter between the principal Debtor and the Surety, it is for the most part a Command, or bidding the Surety to engage his credit for him: But if we respect the business between the Creditor and the Surety, who receives nothing at all from him, it is an Act purely free; yet because it confines upon such Contracts as are burdenom, therefore it is to be reckoned as such: So the giving of a thing to pawn or as a pledge, seems of it fell to be a free act, whereby the detaining of the thing pawned becomes lawful, but this also derives its nature from the Contract, which is thereby strengthened and secured.

All such Acts as are profitable unto others, besides those that are merely bountiful and beneficial, are comprehended under the name of Contracts.

In all Contracts Nature requires an equality, and that so strictly that she gives a right to him, that through inequality hath less than his due. This Equality doth consist partly in the Act of Contracting, and partly in that about which the Contract is made: And in the Act of Contracting, as well in those Acts that are precedent, as in those that are principals.

It appertains to the Acts that precede any Contract, that he with whom we have to deal, should discover unto us all the faults and defects which he knows to be in the thing contracted for, which is not only required by the Civil Law, but is molt agreeable to the nature of the Act, there being a nearer relation between the persons contracting, than that which is common to all mankind. And that may that of Diogenes Babyloniun be answered, handling this Argument, namely, that all things are not hid which are not spoken: Neither is it necessary for me to express all that is profitable for thee to hear, as in matters celestial; for the nature of our Contract being invented for gain and profit, requires something farther. To this purpose Vatnus Maximus brings in an excellent example in Claudius Conunatus, whose bope standing near the Capitol, and to hindering the Augurs in the prospect of the Birds, and consequently in their divination, was ordered to be demolished; which Claudius knowing, but concealing, went immediately and sold his House to Calphurnius Lanarius, who understanding the cheat, appened to Cato; who prudently condemned Claudius, alleging that bona fide vendor, nec commodum sum auxere, nec inconstomeum cognitamse observare auctor. And that with a great deal of Equity, faith Vatnus, for an honest Seller should neither hide nor shew to him his knowledge of the incommodities of what he sells. It was a good observation of St. Ambrose, In contractibus eam visitam eorem quan venitum prodi jubenter; as nef ini- timaverit venditor, quam au in jus emptoris transfertur doli actione succurrat: In ordinary Con- tracts, whatever defects are in the thing exposed to be sold, ought to be discovered to the Buyer, which if not faithfully done, though the right of the thing be transferred to the Buyer, yet ought the Contract to be null, by reason of the fraud in the concealment of the defects. As in case a man should sell an House that is haunted with Devils, or infected with the Plague, or a Servant that is a Fugitive, and doth not discover it, regarding only his own profit and not natural equity. Non eft illa sapientis, sed callidis & affutius, That man is not wise, faith Caremaudes, but crafty and knowful. But if the thing concealed, do not immediately concern the thing contracted for, we are not bound to reveal it: As if Lepse to sale such things, whereof I know a greater quantity is coming in after to be sold, I may safely conceal minor knowledge, yet even to discover this is commendable, and in some cases not to be omitted without breach of charity; yet I dare not say it is unjust, I mean any violation of his Right with whom we have to do. So that what the fame Diogenes faith in the fame place (as Cicero quotes him) is very true, and to the purpose. Adveni, composi, vendi munean; non plures quam cotiti. Forfae erust minoris, cum major sit copia, cui fit injuria? Either have I brought my goods, I expose them to sale, I sell but mine own, and at no dearer rates than others: Perhaps when there is greater plenty they will be cheaper, and in fo doing whom do I injure? Whence then we may observe, that of Cicero is not generally to be admitted, that to hide a thing is, when thou wouldst have them whom it concerns, to be ignorant of what thou knowest, thereby to gain profit to thy self. For then only is this concealment unjust, when it immediately concerns the thing that is to be contracted for, as in House infected with the Pestilence, or ordained by the Magistrates to be pulled down, or the like: For of these things there should be, between the Buyer and Seller, an equal knowledge, for that makes them both equal.

And as there should be an equality in knowledge between both the Contractors, so should there also be a like freedom of Will between them; not that in case the Seller be preposset with an unjust fear, no Contract can be made with him till that fear be removed, for that is a thing extrinsic to the Contract. But that no man ought to be constrained through fear to consent to the sale of what he would not otherwise part withal, and if such an occasion of fear be given him to that end, that it should be first taken away, that is, as well as the Buyer may have a like freedom of Will. When the
Greek Hist.
l. 3.

X. I. Equality in the act it self if it be permutatory.
A just proportion to be observed between the Giver and the Receiver.

XII. And in the things contracted for.

XIII. What Equality takes place in Acts merely or in part beneficent.

Things lent.

Things deposited.

the Aliians had bought some Lands of their Neighbors, who durst not deny to sell them on any terms. The Lacedemonians made no scruple to make void the Contract, and therefore caused the Alians to make restitution; alleging, That there was as much injustice in taking away the Goods of their Infringers, under the specious pretence of Purchasing, as in extorting from them by mere force, which are the very words of Xenophon. But what exceptions the Law of Nature admits of in these cases, shall be discuried of in its proper place.

In the very principal act of Contracting, there is also required this equality, that no more be exacted than what is fit, which rule is of no force in such acts as are beneficent: For if I will give somewhat more by way of reward, either for work done at my command, or for things lent me, or for preferring things deposited, than is justly due; I do no man wrong, I do but mix the act by making it partly permutatory, and partly gratuitous. But in all permutatory Contracts, this equality is punctually to be observed: Neither is it to the purpose to pretend, that what is either promised or given by either party more than is due, may be accounted as a donative; for this is not the usual meaning of Contractors, nor is it to be so prefixed, unless by some act or word it be so declared. For whatsoever either party doth either give or promise, is but in proportion to what they expect to receive, and as it were to even the Balance; inasmuch that Mr. Chrysostom was of opinion, and not without reason, That in Contracts as often as we strive earnestly to buy any thing for less than it is worths, or to have more than our just measure or weight, there was in that a kind of Theft. He that writes the Life of Sisoro in Phusis, tells a Story of one Hermis, who having bought any thing that was judged more worth than he paid for it, would add to it of his own accord add as much as he was valued of the true value, holding it a kind of injustice to detain it, but such an injustice as few men then understood (and as few now days would scruple at.) And in this fense do the Jewish Doctors interpret that Law of Moses, If thou sellest ought to thy Neighbors, or buyest ought of thy Neighbors hands, ye shall not oppress one another.

Yet farther, Though both parties have equal knowledge of the thing contracted for, and also equal freedom of Will, so that there is nothing concealed that should be discovered, nor a greater price exacted than is thought to be due, yet if there prove to be any inequality in the things themselves, which the parties themselves could not discern, or that there were a mistake of the just price or value, then that error or mistake is to be rectified by the Roman Laws: And he that hath too much must impart to him that hath too little, because in that Contract it was or ought to have been the mind and meaning of both parties, That there should be an even balance in a right estimation. And yet do not the Roman Laws require this in every unequal Contract. In case the inequality be but small, the Law takes no cognizance of it to prevent multitudes of suits; but only where the inequality is weighty, as where it exceeds half of the just value: For the Law (as Cerro faith) refraineth iniquity by pinnacing the hand, but Philosophy by Reason and Understanding. But they that are not subiect to Civil Laws, ought to follow that which by the dictates of right reason seems unto them righteous; yea and they also that are subject to such Laws, so oft as they have to do with such things as are agreeable to Piety and Religion, if the Laws do neither give nor take away Right, but only deny their aid and assistance unto it for some certain reasons.

But here also it is to be observed, that some equality ought to be had even in such Contracts as are beneficent, yet not altogether so strict as are in those that are permutatory, but as the case of such Contracts may be supposed, namely, left any man should be damnified by the good he doth. For example, That he who doth any thing in obdience to another Command, should be favored harmless and indemnified, as well in respect of his charges, as of any loss sustained by reason of the execution of that command. Again, That he to whom any thing is freely lent, should satisfy the just value, if the thing perished in his custody, because he stands obliged to the owner not only for the thing it fell, but also to be thankful for the courtease done him in the loan thereof, unless it be evident, that the thing so lent had certainly so perished, had it continued in the possession of the right owner: For in this case he logeth nothing by the Loan. But in the contrary, He with whom any thing is deposited, receives nothing but a bare trust; and therefore if the thing miscarry he is not bound to repair the loss: Neither in respect of the thing trusted, there being no risk in being, neither is the Trustee any thing the richer for it; nor in respect of his acceptance of the trust, because thereby he receiveth no courtesie but doth one. And as to things pawned, as also in things let out to hire, a middle way is to be taken; for in every case of loss the receiver is not bound to restitution, as he is to whom a thing is lent; yet is a much greater care required from him to preserve it, than of that which is committed barely to trust, because the acceptance of it though gratuitous, yet usually comes very neer unto such Contracts as are burdenon. All which do agree with the Roman Laws, but were originally extracted from natural equity; and are therefore found
found to be of force amongst other Nations: As (amongst others) of the Hebræans; for to Moses Maimonides testifies. And hereunto hath Seneca respect, when he faith, That some one fidelity and others Tulleæe and Prædææ. And by these rules we may easily pass our judgments upon other Contracts: But now having (as far as is requisite to our purpose) sufficiently discours'd of Contracts in general, we shall briefly handle some more particular questions concerning them.

The most natural measure whereby the true value of everything is known, is by the want of it, as Aristotle rightly observes; which rule the barbarous Nations do very strictly walk by: Yet is not this the only rule that guides the value of things, for the mind of man, like an Empreß, covets many things for their rarity, which are not purely necessary. Margaretæa preter Luxuriæ fecit, It is Pride that gives the price to Pearls, faith Pliny. And in another place, Look, faith he, what value we put upon the Indian Pearls, the same do the Indians put upon our Coral; for these things are valued by the opinion that Nations have of them. And no marvel, faith St. Auguflin. For in the esteem of these men, an Horſe is sometimes bought at a far dearer rate then a Servant, and a Jewel than a Slave, &c. So Cicerone, Qui modum eff. in his rebus cupidissatis, idem ess affirmationis: Nothing so much heightens the price of these things, as the longing desire that men have after them. So likewise on the contrary, Those things that are most necessary, are least priz'd where there is great plenty of them: Which Seneca illustrates by many examples, where also he adds this, The price of every thing varies with the times, when thou hast sufficiently praised these things, they are so much worth as they cannot advance to more. So likewise Faustus the Lawyer, That which gives a just value to any thing, is not the affection of any one person, or the profit that this or that particular man can make of it, but what it may be commonly sold for. And this cannot be at all times alike and certain, but it rifeht and falls according to the pains, expences, and hazards, that Merchants are at in their importation. Neither doth St. Auguflin disapprove of it, who upon the Seventieth Pfalm, brings in the Merchant pleading thus, Affero a longinquo merces, mercedem laboris mei unde sequam, pro Dignum enim eff Mercenarius mercede fia, &c. I bring my Merchandizes from far, I require but a reward for my pains that I may live, the Labourer is worthy of his hire. But faith the good Father there, De mendacio & perjuria agitatur, non de negatio, It is not thy Calling but thy Lying and Perjury that we condemn. Moreover the prices of things may rife or fall by reason of the plenty or scarcity, either of Buyers, or Money, or of the Merchandizes themselves. Besides, such Accidents do sometimes fall out, as may justly enhance or leffen the prices of things, as namely, we may haply fullain some future loses by the fale of the things, or for want of them; or our gains we make by them may ceafe, or we may be unwilling to part with them for some affection we particularly bear, either to the things themselves or to him that gave them: And therefore we would not willingly fell them but in favour to him that buys them. All which ought to be declared to him with whom we are to Contract: Regard also may be had unto that damage or furnceal thing, which is occasioned by either the delaying or anticipating the payment of the price agreed on.

As to buying and felling, we must know that the bargain and fale is good, from the very minute of the Contract: For though the thing bought be not actually delivered, yet may the property by a bare mutual consent of both parties be transferred, and this is the most simple and innocent way of bargaining. So Seneca, Penditio alienatio eff, & rei fui jurifque fui in alienum tranlatio; Selling is the alienation of a thing and the translation of it, together with our right and property in it to another. But if it be so agreed that the property shall not pass presently, then shall the Seller be bound to transfer his dominion, and in the mean time both the profit and periul shall be the Sellers: And if it happen that one and the same thing be twice fold, that fale shall be most valid which hath the property first translated, either by delivery of possiſion or otherwife; for hereby doth the moral power pass away from the feller to the buyer, and that which is made by promife only shall stand for nothing.

Monopolies are not all of them repugnant to the Law of Nature, for they may be permitted by the Supreme Magistrate upon some just cause and at a certain rate, as may appear by the example of Joseph in his Government of Egypt. So also under the Romans, the Alexandrians had the Monopoly of all Indian and Ethiopia Commodityes. The like may be instituted by private men, so that they retail them for moderate gains. But that, like the Oylmen in Polaæum, shall purposely combine, and either by fraud or force flop the importation of Goods, that they may enhance the price of those they have, which is already at the height; or that agree to buy all the Goods of that kind that come in, to the end that they may fell them at what rate they please; are very injurious to the Common-wealth, and are bound to make reparation. But if by any other means they shall hinder the bringing in of such merchanries, or shall therefore engroffe the whole to themselves, that they may vend them at a price (respect being had to the time in which they fell them) not unreasonable, they infringe the Bonds of Charity (as St. Ambrofe proves)

XI V. Concerning the price of things, how they may be dearer or cheaper.  
† Lib. 32. Pearls and Coral.  
† De Civit.  
† 11. 6. 10.  
† Of Merchants.

X V. When a fale is perfected by the Law of Nature, and when dominion paflh.

X VI. What Monopolies are against the Law of Nature or the Rule of Charity, The history of Thea is well known.
Of Contracfs.  BOOK II.

off. 3. c. 6.

XVII.

How Money receives its value.

Ad. 5. Nicom.

XVIII.

Rents not to be remitted for barrenness or such like chances.

XIX.

How the reward of mens labours may be increased or diminished.

XX.

By what Law Ufury is forbidden.

by many Arguments, though to speak properly, they violate no mans Right.

As for Money, the office it performs it naturally receives, not from the sole matter, or metal, nor from its form or appellation, but from a more general relation, namely, as we counterpoise it with other things, especiably, with those that are most necessary: Now the value that is put upon it, if it be not otherwise agreed on, must be according to the rate, that it bears at the time, and in the place, where payment is to be made. Now as Michael Ephesian rightly observs, Money it self varies at all other things do, according to the plenty or scarcity of it; for as we have not always like occasion to use other things, and according to our desire of them, so the prices rise or fall: So Money does not always retain the same value, but sometimes it is more and sometimes lesser worth. But yet the prices of Money is most rising: Which we use chiefly as a counter-balance to all other things, whereunto it is compared. Now that which is the measure or standard to all things ought in itself to be constant. And therefore Gold, Silver, and Bras by themselves are of the same value almost always and in all places. And as other things that are useful or necessary, are either rare, or abounding, so the same Money in weight, and made of the same Metal is sometimes more, and sometimes lesser worth.

Next to buying and selling (as Cajus notes) is letting and taking to hire, and fleering by the same Rules. That which answers to the price is the rent or hire, and that which answers to the Propriety, is the possetting and enjoying of the benefit of it. Wherefore as when the thing periheth, the owner bears the loss: So when the thing hired proves sterile or barren, or by any other accident proves fruitless and unprofitable; the loss is naturally the present occupiers: Neither hath the Lord any thing the lfs Right to the rent or hire agreed for, because when he delivered the thing to him to use, it was so much worth as was contracted for. Although that may be changed, either by general Laws, or by Covenants between themselves; yet notwithstanding if he that first hired the thing be disabled to make use thereof, and thereupon the owner let it to another, whatsoever he shall gain thereby, more than the hire first agreed for, he shall repay to him that first took it, lest he should enrich himself by that which is due to another man.

Again, what was before said in the case of selling, namely, that the price may be more or less if the thing were only sold to gratifie the buyer, but otherwise was neither to be bought nor sold: The same may be understood of any thing, or of any work let or taken for hire; in favour of him that requires it. But if a man by one and the same pains may accommodate diverse persons, as in conveying them from place to place, if he that undertakes it shall oblige himself entirely to every one of them, he may require the same reward from every one, as he exacted from the first, if the Law do not otherwise provide; because that, by my labour a second, third or fourth person receives a benefit doth no whit prejudice the Contract made with the first. And if the benefit be equal, lurely the reward ought to be so too.

As concerning Money lent, it is frequently questioned by what Law Ufury is forbidden: and although it be the most received opinion, That it is prohibited by the Law of Nature, yet was Albuleysis of a contrary Judgement, neither are those arguments which are brought to prove the adverse part of such worth as to turn the Scale. For whereas it is said of things lent, that they are lent freely, as much may be said of things delivered to another to use; and yet if any thing be required for the use of either, it may haply cause the Contract to pass by another name, but it cannot make the taking of a moderate price for the use of a thing unlawful. Neither is that argument which they draw from the Sterility of Money any thing more perswasive. For mens Industry is able to make Houses, Lands or any other thing, which in themselves are barren, to become fruitful. But that which seems to be the most plausible Argument is this, that here one thing is given for another, as an House for Rent. But the use of a thing cannot be distinguished from the thing itself, where the thing itself perifheth by the using of it: And therefore for that nothing ought to be exacted. But here we must note, That when by the decree of the Senate, the fruits arising from the use of things, that either by theire perifh, or are transferred into the dominion of another was introduced by the Name of Ufusfruitus, (which properly signifies the profit that is gained by the use of another mans goods, the property remaining his own) they intended not by that word Ufusfruitus, that it should obtain the same effect of right with that which was properly so called. For certainly the word so taken could not according to its Propriety agree with such a Right. Neither will it thence notwithstanding follow, That such a Right is nothing, or not valuable: Since, on the contrary, it is certain, That if any man would yield up such a Right to the Proprietor, Money may be required upon that account. So also the Right of not paying either Money or Wine borrowed, till after such a time, is valuable: Minus enim solvit, qui tempore minus solvit; For he pays not his due that pays not in due time. And therefore in Lands mortgaged for Money, the profits of the Land should answer for the use of the Money. Now what Arguments are brought by Cato, Cicero, and Plutarck against Ufury, do not so much respect
respect the intrinlick nature of the thing, as the adjuncts and consequences of it. What we are to do in this case, we may collect from the Law given by God to the Hebrews, which forbids them to lend money each to other upon Usury. The subject matter of which Law, if it be not necessary, yet it is morally honest: And therefore in Psal. 15. it is enumerated among such as are highly Moral; as also in Ezek. 18. Some there are (faith Hierom) who place Usury in the gain by money only; but the Scriptures do providently take away all immoderate Gain by any thing; and do require, that thou shouldst take no more than thou gavest. Now such Precepts as these are, do as well oblige Christians as Hebrews, we being called to be more excellent patterns of Virtue than they. Wherefore look what Moral duties the Law then enjoyed the Jews, and all that were circumcised, for they were both herein equally obliged, the same ought now to be observed by all Nations, the partition-wall being now taken away by the promulgation of the Evangelical Law, which under the notion of Neighbour, comprehends all mankind; as by that excellent Apology of our Saviour concerning the Samaritan, most evidently appears. So Arnaudius tells the Christians of his time, That they were communicative of their goods with all men, loving all men as if they were their brethren. And therefore Laclanmus treating of Christian duties, makes this one, He shall not (faith he) give his money upon usury, for this is to seek gain by another's wants. So also St. Ambrose, Subvenire non habenti humanitatis ess, Durtius Antonius, et exsequore quain deders; To relieve the wants of others is humane: and therefore to require more than was lent, cruel. And Augistus Cesar himself blamed some who took up money at an easte rate, to lend it to others upon harder terms. St. Chrysostome speaking of fasting, gives this Caution, If thou fast, take heed that thou lend not thy money upon usury, but break the bonds of all unjust Contrasts: And on the last Chapter of the first Epistle to the Corinthians, he faith, That be that offers into God money gained by usury, is as if a woman should offer out of her Merituous Gain. It is notwithstanding to be observed, that there are Contracts which have some reference of Usury, and are vulgarly so called, which yet are of another kind: As when the lender requires somewhat to repair the damage he hath sustained, either by reason of the long detention of his money lent; or being frustrated of the hopes of gain that he might have made by it, deducting notwithstanding somewhat in respect of the uncertainty of those hopes, and also for the labour and hazard he must have run for it. So likewise, to deprive of that which lends money to many, and to that purpose keeps his money ready (with his Books of Account); and for the danger he runs of losing the Principal where it is not sufficiently secured. If any thing in these Cases be required, it is not to be reputed Usury. And if we would know, what opinion the Roman Lawyers had of it, we shall find, that as they hated the word Faenus; so they would easily admit of Usura. Usura, non proper lucrum potentium, sed proper moram solvendae: Not that the lender desired to make a gain by the wants of the borrower, but because his money is not paid at the time agreed on. The difference being only this, [Faenus] is that which we contract for more than the principal, nearly out of a desire of gain: But [Usura] is that which is given more than the principal, left the lender should be damaged by the detention of the principal. But since this word Usura being abused by some, hath gotten an ill report; therefore hath this latter Age subtituted in its room the word Interest. Demophines in his Oration against Pantanistes, denies peremptorily, that he deferves to be branded with the name of an Usurer, that lends what he hath got either by merchandizing, or by his honest labour, sub modico lucello, for some moderate gain: partly that he may keep what he hath got; and partly, that thereby he may gratifie another. It is recorded of Germanus Kinman to Julianus, That he lent money to every man that needed it, to be employed; but never took any thing that differed from the name of Usury. (True it is, that the Scriptures, the Fathers, the Canon Law and the Statutes do all declaim against Usury, so do the Civilians: Baldus calls it a profitable Theft or Piracy. Bartolus condemns all Usury, so do the Roman Emperours, and most Common-wealths; yet are they contented to tolerate it, being restrained and moderated. The Hebrew word Nephesh, signifies a biting or grinding Usury, such a lending of money, as under the pretence of Charity, devours the poor borrower. The matter that binds the Conscience, is the Debtors gaining nothing by the money lent, and not the taking of much or little Interest. It is a more biting Usury, to take 2 or 3 per Cent. of him that gets nothing, than to receive 6 or 8, of him that makes thereof a greater gain: which was the case, that among the Romans, he that took Usury of the poor, was more punished, than he that robbed the rich. No man is by the Law bound, or so much as admonished to lend to those who have no need: And in case another man gain by what is mine, Natural equity requires that I should be a gainer, by so much as he, by my means, is made the richer. Again, If to a man that stands in preferment want, I lend freely until such a time prefixt, if he fail then of payment, and I thereby incur any damage, it is reason that he should satisfie the damage, and fo Interest may be due by Damno habita, for the los I sustaine. Also, if a Trade man lend his money which he}
can spare till such a Mart to be then paid, and the borrower fail in his payment, where- 
by he is disabled to drive on his Trade for the next year; then shall he be bound to sa-
tisfe the damage the lender sustaineath proper lucrum cessans, by reason that our hope of 
gain ceaseth. Again, four men are Partners in one Shop, two being Aged supply Mo-
ney, the other two being young and active, do take pains to improve it; if they by 
their labour and care gain 20 or 30 per Cent. and pay the other two being past their la-
bour, 6 or 8 per Cent. for their Maintenance, Can this be called Biting Ulfty? If it be ob-
jected, That the two lenders take no pains, nor run any hazard, I answer, Yes, they did 
doubt less take pains when they were able, and they do now run an hazard by lending 
their money to them that are painful, but have nothing. It is recorded by Procopius, to 
the honour of Germans, a Kinman of Justinian's, That he lent great sums of money, to 
be employed by such as needed it, but never took any thing that deferred the name of 
Ulfty. Our King Edgar forbid Ulfty, and Edward the First sent away all the Bankers 
whom Gregory the Tenth had sent out of Italy into England ; and placed in Lan-
bard-street. Henry the Eighth allowed 10 per Cent. for one year, which Edward the 
Sixth repealed. Queen Elizabeth tolerated 10 per Cent. so did King James, which Charles 
the First reduced to 6 per Cent. which yet continues.

But these humane Laws that tolerate a moderate gain, for the use of money or any 
other thing (as in Holland they permit 8 per Cent. to some, and 12 per Cent. to Merchants 
for a year, as a reasonable compensation for that loss which the lender doth or may 
sustain by the forbearance of his money) are no way repugnant to the Laws, either Na-

tural or Divine: But if they exceed this rate, those Laws may afford Impunity, but no 
just Right.

A Contract for the enquiring of Goods from Casualties either by Sea or Land, is al-
together void, if either of the Contractors do know, that the Goods are already safely 
arrived at the Port or place whither they were bound, or that they are perished by the 
way: not only in respect of that parity or equality of knowledge, that there should be 
between such Contractors, but in respect of the subject matter of such a Contract, which is 
a loss, but uncertain, which in respect of both parties may, or may not be. But at 
what rate these Goods are to be secured, depends upon common estimation.

In social Negotiations where traffick is maintained by the joint Stock of a Company, 
if every member contribute an equal proportion in money, their gain or loss, shall also 
be equal; but if their proportions be unequal, every member shall be rated according 
to his proportion: The like is to be observed, where the traffick is to be maintained by 
joint service, accordingly as the service is by agreement, either equally or unequally to 
be performed. But yet, in such Negotiations, services may be let against money, or 
against service and money, so that they may answer one another, as it is usually said, 
Par pari dampiis basis memorit um ejus opus pecunia. To give like for like, is to even the scales.

But this may be done diverse ways; for, either service may counterbalance the bare use 
of money, in which case the principal stock whether preferred or lost, is entirely his 
gain or loss that owns it, or the work or service may counterbalance the whole stock of 
money; in which case, he that doth the work, is partner of the whole stock. In the 
former of these cases, the work is let again, not the stock, but the danger of losing it, 
or the gains that probably might be expected from it. In the latter case, the price of 
the labour is added unto the stock of money, and he that performs it, shall have a share in 
the stock equivalent to it. But that either of the parties associated, should share in 
the profit, and yet be indemnified in case of loss, is preternatural to societies; yet such 
Agreement there may be without injury: As when there is a mixed contract, partly by 
the society, and partly for endurance, wherein such an equality may be observed, as that 
he that allumes to make good the loss, shall receive a greater proportion of the gain, 
than otherwise he should have had. But that any man should bear the loss, that partakes 
not of the gain, is inconsistent with a society, whose principal end is common profit, 
without which it cannot confit. Now, whereas the Lawyers say, That where the proportions 
are not expressly named, they are to be understood as if they were equal, this 
holds true only where other things contributed are also equal.

Where a Fleet is sent out by the joint Stock of a Society against Pyrates, there the 
common Profit is the common Defence; and sometimes the Prizes taken from the Enem-
ies: And then the Ships and all that are in the Ships are to be apprized, and drawn into 
one grosfsum, out of which, all charges and damages are to be deducted, and born by 
the Owners of the Ships and Goods, according to the parts they have in that sum; 
and among those charges, that of the wounded, is to be reckoned. And what we have 
hitherto said, we judge to be most agreeable to the Law of Nature.

Neither do the Voluntary Laws of Nations alter any thing of it; except only in this, 
That where the Contributions are unequal, yet contented unto, if no lye be in the cafe, 
or any thing concealed which should have been declared, in all external Actions they 
shall
shall be held as equal: So that as by the Civil Law, before that Constitution made by Diocletian, no action would be admitted of in a Court against such an Inequality; so now by those that are consolidated by the sole Law of Nations, no exception or constraint can be admitted for that cause. Of this opinion was Pomponius. That naturally in buying and selling, it was lawful for one man to circumvent another: where the word Lictorum is not the same with Fas; but it was so permitted, that there was no Remedy provided against it for him that was willing to justify himself by his Agreement: In which sense that is termed Natural in this, and some other places, which is every where countless received. In which sense, St. Paul himself, that some men are naturally vain, and that it is against nature, that a man should nourish his hair, when it was only against Custom; and that not of all, but of those Nations wherein he had lived. So the same Apostle speaking not in his own, but in the person of the Romans, with whom he converses, faith, That they were by Nature the Sons of wrath: so that Nature is nothing but Custom, or that which hath been of long continuance. In which sense Galen is to be understood, where he faith, That Custom is an acquired or adventitious Nature. So likewise Theophrastus, Humana natura Legum rhetor; Humane Nature cannot be bound up by any Laws. So the Grecians called both Virtues and Vices, χαρακτήρ, when by long Custom they are made natural unto us. Now how great an advantage of such a Law if introduced, would be to the General Peace, is evident: for it would prevent infinite contentions which would arise, concerning the uncertain prizes of Commodities, which could not possibly be determined or avoided, where there was no common Judge, if every man might break off from his agreement, upon pretence of such an inequality. Hac eff Empionis & redemptionis substantia, (say the Roman Emperors, calling a perpetual Custom by the name of Substance) This is the perpetual manner of buying and selling, the buyer bearing the price as low as he can, and the seller drawing up the buyer as high as he can, till at length they agree in an equal and just value. And Seneca respecting this very Custom faith, What matter it is what anything cost, if the buyer and seller are agreed about the price? He owes nothing to the seller, that gives a good bargain. And much after the same Copy writes Andronicus Rhodos, That which by the mutual consent of the Contractors is gained, is neither unjust, nor should it be amended: For the Laws do indulge a license in these things. And that same writer, the Life of Isidore, calls the selling of any thing at too dear a rate, or the buying of any thing at too cheap a rate, An Injustice tolerated by the Law. Harum revum licentiam Lex debuit, faith Andronicus Rhodos; The Law gives a License in these things. But yet such a permission it is, as will at length undermine and easily pervert Justice.
Of Oaths.

BOOK II.

CHAP. XIII.

Concerning Oaths.

I. The great Authority given unto Oaths by the Heathens.

II. Great deliberation required in him that would take an Oath.

III. Oaths oblige in that sense which he to whom they are made, is thought to understand them.

IV. An Oath procured by Fraud, when binding.

V. The words of an Oath not to be wrested beyond their ordinary sense.

VI. An Oath binds not to things unlawful.

VII. Nor to things that impede a greater moral good.

VIII. Nor to things impossible.

IX. What if the Impossibility be but for some certain time?

X. To be sworn by the Name of God, and in what sense.

XI. By other things in respect to God.

XII. It is an Oath though be sworn by False Gods.

XIII. The effects of an Oath: whence arises a twofold obligation, one at the time of the taking of it, and another after. This explained.

XIV. When by an Oath a Right is gained to God and Man, and when to God only.

XV. The opinion, That an Oath, given to a Pyrate, or a Tyrant, binds not before God, refuted.

XVI. Whether an Oath given to the Perfidious, be to be kept: explained by a distinction.

XVII. He that is bound to God alone, doth not bind his heir after him.

XVIII. It is no perjury not to fulfil that, which he for whom it should be fulfilled, is willing to remit it; nor when the quality ceaseth whereunto it was sworn.

XIX. When that is made void, which is done against a man Oath.

XX. How far the Princes power prevails, concerning what either his Subjects have sworn to strangers, or strangers to them, explained by distinction.

XXI. Of what manner of Oaths the words of Oath, are to be understood, when he forbids us to swear at all.

XXII. What Curses or manners of Speech, have by Confine the force of an Oath, though not the Form of one.

In all Contracts, Vows and Promises, the greatest assurance that any Age or Nation could ever either give or require, of their Faith and Sincerity, is by Oath. This is an indissoluble bond, which wholly violates, is deservedly reputed as an execrable and accursed thing both before God and men, whereof Sophocles speaks thus,

The mind that's startled by a sacred Oath,
Will carefully avoid two smarting Rods;

Nullum viniculum ad astringendum fidem, majores nostri iurepuraando artissis esse volueram: Our fore fathers, faith Cicero, never knew any thing stronger than an Oath, whereby to bind us to perform our promises: and to violate this bond, they always accounted a fin of the greatest magnitude; neither did they believe any other sin to be so severely punished, as this of perjury: for Hevand tells us,

Wherein is't that mortal men thus plagued are? Surely, because fallaciously they swear.

This is one of those sins which draws down vengeance on our posterity after us, and wherein the bare Will is punishe, without the deed. Of both which, Herodotus hath given a clear example in one Glaneus, a man highly famed by the Lacedemonians for his Vertues, but especially for his Justice; with whom a Citizen of Miletum (confiding in a man of so great a repute) left deposited a very great sum of money, with a writing, defiring him to keep both, and to pay the money to such, as should hereafter bring him a duplicate of that writing. Glaneus accepts of the money and condition; but when the money was demanded by his Sons, and the duplicate fled, he denied that he knew anything of it; yet he told them, that he would rub up his memory, and in case he could retrieve it there, he would repay it: otherwise, he threatened to proceed against them according to the Graecian Laws. So disdaining them for four months, and in that time consulting the Oracle of Delphos, whether he might by his Oath make prey of the money, he received this stabbing Answer:
A namelesl Brat, flumpt both in Hands and Feet,
False Oaths bring forth; which yet in furious rage,
Consumes the House, and blasts the Heritage.

Glaucus hearing this, devoutly implores the Gods to forgive him; but is again answered, That it was the same thing to tempt the Gods in this case, by the Will, as by the Deed. And though Glaucus did restore the money, yet the Curfe denounced by the Oracle did fall upon him: For in the third Age, Glaucus had neither Child, nor Hone, nor any to inherit his Name, which also had been forgotten long since, but that his example might (like Leto Wifes pillar) deter others from the like attempt. Juvenal also reciting this story, concludes thus,

Has patitur poenas pecundis sola voluntas.

The bare intent to Sin, such Plagues attend.

So true is that of the Prophet Zachary, I will bring the Curse into the house of him that sweareth falsely by my Name (faith the Lord), And it shall remain in the midst of his house, and shall consume it, with the Timber thereof, and the Stones thereof, Zach. 5. 4. Cicero was in the right, when he termed an Oath, a Religious AFFERATION or a Divine ATTESTATION of the truth of what we say: For what we seriously affirm or promise, and call God to witness of, that are bound to make good and to perform, under the greatest penalty that can be. But whereas he adds, Not for fear of the Anger of the Gods, which it none at all, but for Truth and Justice sake. If by Anger he means a passion, or perturbation of the mind, we deny it not: But if he understand by Anger a will to punish or revenge, it can by no means be admitted, as Laebanus rightly observes. Now let us flee from whence this Sacred Power of an Oath ariseth, and how far forth it extends.

And in the first place, What we have already said of Contracts and Promises, is true also in the case of Oaths, namely, That he that swears, shoule be of sound mind, and shoule use great deliberation before he takes it. (The Romans would not permit any man to swear by Hercules till he had gone out of the Court for a while, and seriously considered with himself what he was to do.) Wherefore if a man not intending to swear, shall rashly utter words importing an Oath (as it is recorded of Cydippe) that may be true, which Ovid affirms of him,

Qua jurat mens est: nil conjuravit nimirum.

It is the Mind that swears: we swear not there.

And what before him Euripides laid in his Hippolitus:

Jurata lingua est, Monte juravi nihil.

It was our tongue that sworn, our minds were freed.

But he that willingly swears, yet is not willing to be bound by that Oath, is notwithstanding strongly obliged to what he hath sworn; Obligation being inseparable from an Oath, and its necessarv effect.

There are some who hold, that though a man do seriously pronounce the words of an Oath, yet if it be not with a purpose to swear, he shall not be bound by that Oath: But that in speaking the words of that Oath he sins, by swearing rashly. But it accords more with Divine truth, that he is bound to make good his words, whereas he hath called God for a witness: For that Act which of it self was Obligatory, did proceed from a serious and deliberate mind: Wherefore though what Cicero faith, be for the most part true, Quod ex animis inuentum juraveris, id non facere perjurium est; That not to perform, what we have deliberately sworn, is Perjorv: Yet it is to be understood, with this limitation, unless he that swears, knows, or at least believes, that he with whom he converseth, doth otherwise understand the words of the Oath. For he that calls God to witness the truth of what he faith, is obliged to perform his word in that sense, wherein he thinks himself to be understood. That Soldier, who being a Prisoner to the Carthaginians had gotten his Parole upon the credit of his Oath, when being departed a little from the Camp, he upon some pretence made his return unto it; and supposing that he was thereby discharg'd from his Oath, fled immediately to Rome, was by the Senate immediately sent back.
Of Oaths.

BOOK II.

The revere
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Oaths a-
among the Re-
mans.

For they regarded not what he intended that swear, but what the Carthaginians expected from him to whom he had sworn. For after this Rule doth God himself judge.

Quin non ut juras, sed ut jureffe putavis
Cui juras, audis: sic est utrique rerum.

This is that which the fame Cicero allerts, What is sworn must be so done as he that imposed the Oath conceived must be done. And it was the observation of Tacitus, That they who swear tamuostos, craftsly changing the words of their Oaths, had their Confidences polluted with wickednefs. Wherefore St. Augustine brands them with Perjury, whom they perform what is expected by the bare words of the Oaths, do yet delude the expectation of thoſe to whom Oath was given. (But as Isidore well observes) though the words of the Oaths be never so craftsly pened, yet God, who is the Judge and Witness of the Confidence, doth judge of it, as he doth to whom we swear understands it. Wherefore Mercurius did wisely, in refusing to swear to the Apulian Law, though he was told that that Law was unduly enacted, and that the Oath was not binding, unless the Law, whereunto it referred, was rightly gained. For although in other Promises it be no hard matter to suppoſe some tacit condition, which if admitted, may aboſle the Promiser; yet in Oaths, such tacite conditions are by no means to be admitted, but if we do swear, we must liquido iuraare, swear clearly and operly: For such an Oath for confirmation, is the end of all Controversies; as St. Paul te-

fifies to the Hebrews, and proves by the example of God himself: Who to the Heirs of the Promise the immutability of his Counſels, confirmed it by his Oath, that by two im-
mutable things, namely, his Promise and his Oath, wherein it is not poſsible that God should de-

scribe us. (For to the word 4ωδος is beltt expended in this place, as Plain Speaking is else-

where called Truth) we might have a sure Conformation. For the clearer understanding of which words, we must know, That the Pen-men of the Sacred Stories do often speak of God, ἀληθινὸν ἐπιθύμησις, after the manner of men: Not properly, as he is in himself, but as he appears unto us to be. For God doth not really change his Decrees and Counſels: And yet he is sometimes said to change his sentence and to repent, as often as he doth otherwife than his words seemed to import, by reaſon of some condition tacitely un-

derstood, though not expreſt, which caeleth to be. So we read in Jonah, Yet forty days and Nineveh shall be destroyed. This was the Sentence that was denounced against their Impenitency; but that cealing, the Sentence was reverſed, yet Gods Counſel did even then remain unchangeable. That such a condition is tacitely to be understood, will evidently appear by that of the Prophet Jer. 18. 8. And, that this was true, not in the case of Jonah and the Ninevites only, Jer. 3. 5. it is plain, by the like proceedings in the case of Abimelech, Gen. 20. 3. Of the Israelites, Exod. 32. 14. Of Abah, 1 Kings 21. 29. In which feene, God may, though improperly, be faid to deceive us, foral-
much as the word 4ωδος sometimes imports an event deluding our hopes or expectation, as it doth Heb. 6. 17, 18. Levit. 6. 2. Now this may easily be admitted of in Comminations, because they confer not a Right to any: And sometimes in Promifes, namely, when some condition is understood, though not expreſt. And therefore the Apostle in the place recited, doth instance in two things, which do necellarily infer an immutability in God: First, His Promise, which confers a just Right. Secondly, His Oath, which will not admit of any conditions tacite, or any ways latent. As may also be feen PZ. 80. 30, 31, and fo to the 36 verfe. But it is another cafe, where the very nature of the business doth clearly discover some conditions to be performed. Whereunto fome do refer that of Numb. 14. 30. where God tells the Israelites, That they shall not come into the Land, concerning which he swear, to make them dwell therein, save Caleb the Son of Jephunne, and Joshua the Son of Nun. Though this Promiſe of the Land of Canaan be much better understood, as sworn to the People and Nation of the Jews, than to any of their perfonns, as is evident by verfe 23. Surely they shall not fe the Land, which I swear unto your Fathers, neither fhall any of them that provokes me, fee it. Whence we may obferve, That the Oath that was made to their Fathers was not to be fulfilled to them, but to their Children: For such a Promiſe might at any time be fulfilled, which was not affixed to any particular perfon, like as it was afterward to Caleb and Joshua.

From whence we may also learn what to think of an Oath by fraud gained; for certainly, in cafe he that sweare, suppoſeth somewhat to be done that really is not, or somewhat to be trulight is false: And unless he did fo believe, he would not have fo sworn, that Oath binds him not. But if it be doubtful, whether he would not have bound himſelf by Oath, though he had not been fo deceived, then fhall he hold to his agreement, For there is nothing that naturally so well becomes an Oath, as plain meaning. And hereunto we may refer the Oath of Joshua to the Gibeonites, which though it were gained by fraud, yet doth it not thence necessarilily follow, That had Joshua known that they dwelt
amongst the Canaanites he would not have spared them. And whereas the Israelites say, Perhaps ye live amongst us, and how then shall we make a League with you? it may be understood of the manner of the League which the Gibeonites defir'd, Whether of Alliance only, as amongst equals, or of Dedication, as with such who to preserve their lives, did willingly surrender all things else to the pleasure of the Conqueror: Or it was so spoken, to lye? That as it was not lawful for them to enter into any League with some people, (meaning that of Alliance;) so also it was not prohibited them to have the lives of such as should freely surrender themselves to mercy. For that Divine Law that commanded them to destroy the Nations, Deut. 20. 10. will admit of this limitation, That if they yielded upon the first summons, they might be received to mercy. As is clear by the Histories of Rahab, who for securing the Spies was faved: Of the Inhabitants of Gezer, who were suffered to live among the Ephraimites, and to serve them: Of the Gergesites, of whom St. Matthew records, that there were some living even until his time. Neither shall we find these enumerated among those that were to have been extirpated, as you may read Deut. 20. 17. Jef. 9. 1. And lalily, It is clear, by that Act of Solomon, 1 King. 22. 20. 21. whereby he is said to have received the remainder of the Canaanites, whom the Children of Israel could not destroy, as his Tributaries and Bond-Slaves unto that day. Yes, and if we examine the cause of that severe charge given unto Mojes for their extirpation, as it is express Exod. 23. 33. Deut. 7. 1. we shall find that in cafe (as the Hebrew Doctors observed) they would submit to the Commandments given to Noah, and his Sons, and pay Tribute, the cause of their extirpation being taken away, they might live. Now, why Joshua might not as well spare the Gibeonites upon their Dedication, as he did Rahab, and the Canaanites of Gezer, upon theirs, no solid Reason can be assigned. And yet that the Gergesites being the Off-spring of the Inhabitants of Gezer, were spared and lived as Tributaries to the Israelites till Christ's time, is most evident by the Sacred Story. The immediate cause of the destruction of all the rest of the Canaanites, was not any inexorable Command given by God to Mojes, for that left them a possibility to live, because a power to submit: But the hardness of their hearts, which, proceeded from God as a punishment for all their great provocations, Jef. 11. 19. 20. that fo, he might destroy them utterly, without any mercy, as the Lord commanded Mojes. Wherefore, considering that in case the Gibeonites had dealt plainly with Mojes, which they durst not do for fear of him, and had voluntarily given themselves up as Bond-servants; It is probable, that he would have spared their lives, under the same condition as he did the Inhabitants of Gezer. Therefore Vobis juramento, The Oath was to remain inviolable: Yea, and the breach of this Oath (three hundred years after, when Saul, either forgetting the Oath of his Forefathers, or out of a well-meaning zeal, slew some of those Gibeonites) cost the lives of many thousand Israelites, in the three years Famine which God brought upon Israel. Of this opinion was St. Ambrose, who handling this Question, faith, Joshua did not think it safe to break the Peace with the Gibeonites, because he had confirmed it by Oath: Ne, dum aliorum perfidiam arguit, unus fendid solveret; Left whilest he punished others for their perfidias, he should be found guilty of Perjury. Neither did this fraud of theirs go altogether unpunished: For where as had they dealt plainly, they had been admitted upon paying of Tribute only; now their Corporal Slavery is at once the price of their lives, and the just Punishment of their Craft and Subtilty. So were the Bruniani served by the Romans, as Cellius relates.

Neither should the meaning of an Oath be wrested to any other fence, than the words do usually bear. Wherefore, when the Children of Israel, having sworn not to give their Daughters in Marriage to the Benjamites, did notwithstanding suffer the Benjamites to take the Daughters of Shiloh by force, and to enjoy them, they were not guilty of Perjury. For it is one thing to give, and another, not to require that which is already lost. Whereof St. Ambrose speaks thus, This Indulgence of theirs was not without a Punishment suitable to their Intransparence, whilst they were permitted only to enjoy those whom they had ravished, without the solemnity of Marriage. Nec hortabantur Israelite, nec prohibebant, faith Josephus, the Israelites did neither encourage the Benjamites, nor forbid them. Now the Law, faith Seneca, may punish him, that succoureth an exile, but not him that only sufferth him to be relieved. Not much unlike was that request which the Achabians made to the Romans, (who were highly displeased at some things by them done, and confirmed by Oath, namely, That the Romans would be pleased to alter what they would, but not to bind them by any Religious Vow, to null those things which they had already established by Oath.) Secondly, that an Oath be binding, it is necessary that it refer to things lawful. For, if the thing promised upon Oath be forbidden either by the Law of Nature, or by the Divine Law, or interdicted by humane Laws, (whereof more anon) it hath no power.
power at all to oblige us. That which is unlawful to be sworn, is unlawful to be done being sworn, and that which is unlawful to us, is unlawful to be sworn. All Oaths have a tacit exception of the higher powers, and of former Oaths: Now God is greater than man, and therefore having first bound our selves unto him, no Oath made against him or against our duty to him, ought by us to be performed, but repented of. No Weapon formed against him shall prosper, faith the Prophet, Es. 54. It is good counsel that Philo gives in this case, Let him that goes about to do an unjust act by reason of his Oaths know, That he doth not thereby perform his Oath but break it. For an Oath is a sacred thing, which deferves our greatest care and devotion, to preserve; whereby we stand obliged to do such things only, as are just and honest. For he doth but accumulate sin upon another, who to a wicked Oath, adds a dishonourable addition. Wherefore let him that hath ensnared his own Soul by a rash Vow, yet refrain from doing wickedly, That God who is rich in mercy may forgive him. For wilfully to contravene a double guilt, when we may be discharged from a single one, is an incurable madness. 'Ralph Vowes are ill made and sometimes wore kept. Our Tongues must not bind our hands to do wickedly, David was left sinful in breaking his Oath, and sparing the life of Nabul, whom he had sworn to kill, than Hedor was in killing the Baptist, or Agamemnon in sacrificing Iphigenia, for their Oaths sake. Surely Oaths were never invented to be the Bonds of Iniquity.

Proflrates fateor posse tæcitus fidem,
Si secleare caret; interim sequa eff sides.

My Faith perform I can, I do confess,
If void of Sin; else Faith's but Wick'dness.

Some Promises cannot be performed, faith Ambrose, nor some Oaths kept, without the violation of our duties to God or Man. And if we have pawn'd our Faith to commit a Sin (the best way to preserve our Faith is to break our Promise.) For that is not properly called Faith, that engages us to do wickedly. Wherefore take the Advice of St. Jerome, In malis Promissis recindite Fidem, in turpi voto muta decretem, impia eft Promissio quæ secleare implicetur; Mak no scruple of breaking that Oath, that would bind thee to a dishonest or unjust action, for that Promise must needs be wicked that cannot be fulfilled, but by making thee wicked.

Yea, though that which is promis'd upon Oath be not unlawful, yet if it cannot be performed without the omission of something that is a greater moral good, it looths its binding faculty: For we owe unto God our growth in goodness, and we cannot abridge our selves of this liberty without finning against him. Some there are, faith Philo, of so harsh and unsociable a nature, either as bearing hatred to all mankind, or so enslaved to their own inordinate passions, that they even strengthen themselves in their cherish'd humour by rash and inconsistent Vows; as namely, That they will never admit such a man either to bed or board; or that they will never do such a man good, nor ever receive any thing from him till death. (St. Augustine being confronted with about one Hubaldus, who to save his own life being threatened had bound himself by Oath to marry his own Concubine, and to thrust his own Mother and Brethren out of doors, and never to relieve them, gives this reflection of the Case, That as to his marriage with his Concubine, whom he had long enjoyed, his Oath was binding, for that was no sin: But as to his not relieving his Mother and Brethren, it could not bind him: For Qui non ali necat, To deny them necessaries, was no better than to kill them: And no Oath can oblige to a sin so unnatural.) Such a kind of Oath was called among the Jews an Oath concerning beneficence or doing good: The form whereof we have set down, Mat. 15. 5. Ἡ κατά πατέρας ἑλεος ἐγγίζεται. That is, By the gift upon the Altar thou shalt never receive any good from me. Which Oath was always to be so understood as if some direful Execration was laid upon it. As, So do God to me, and more also, if thou ever receive any good from me, which Oath was among the Jews thought to be the most binding of any, yea, though it were against our own Parents. Such corrupt Interpreters of the Law of God, were the Jewish Doctors in those superfluitive times: Which Christ there confutes, making no distinction between honouring our parents and relieving them, as appears by comparing that of Matthew with the like in Mark, and with 1 Tim. 5. 3, 17, and Numb. 23. 11. Yea, though it be not made against our Parents, but against others, yet doth it not bind, because it is a duty we owe unto God to do good unto all men, which is altogether inconsistent with such an Oath.

But as to things that are for a certain time impossible, or supposed at present to be so, the obligatory power of that Oath hangs in suspense, inomuch that he that swears supposingly, ought to endeavour, as far as in him lies, to make that which he hath sworn possible.
The forms of Oaths may be different, but the substance of all are alike: For all invoke God as a Witness, or as an Avenger, both which in him are one and the same. For in calling him to Witness, who hath a Power and a Right to punish, we do but bespeak him to a Revenge due to our Perfidiousness. And he that is omnipotent is therefore an Avenger, because a Witness. What is to swear (faith Ambrose to the Emperor Valentinian) but to acknowledge that Divine Power which thus involveth, to witnesses and defend thy truth? Every Oath, faith Plutarch, ends in some Cause in case we Swear falsely. And therefore the ancient forms of making and swearing Leagues was usually by killing of Sacrifices, as appears Gen. 15. 9, &c. and by that of the Romans in Levi, Tu Jupiter, ita illum ferito, ut ege hunc portum; And do thus, O Jupiter, defend thy ancient brethis league, as I do this Hogg. And in another place, the Priest killing a Lamb, Prays the Gods, to kill him that transgressteth that Oath, as he doth that Lamb. So in Polybius and Fesuus we read, If I knowingly deceive, let God cast me away from him, as I do this Stone.

It was the custom of the Ancients, not only to swear by God, but by other both things and persons, thereby either wishing those creatures might be noxious unto them in case they swear falsely, as when they swear by the Sun, the Moon, the Heavens, the Earth, &c. or wishing they might be punished in them; as when they swear by their Head, by their Lives, by their Children, by their Prince, &c. Neither did the prophane and barbarous people only swear thus, but the Jews themselves. Philo the Jew among his Special Laws, tells us, That it is not fit for us upon every slight occasion, to have recourse to the Creator and Preserver of all things. And Homer's Interpreters do tell us the name of the ancient Grecians, that they were not easily induced to swear by God, but by other things that were present, as by the Scepter, &c. Thus Apollonius tellth of Sacrates, That he was by such things, Non ut per Deos, sed ne per Deos; Not as by Gods, but left them to be the Gods. And this custom (as Porphyry records) was introduced by that Prince, who was so famous for his Justice, King Rhadamant. So did Joseph according to the custom of that Nation among whom he lived, swear by the Life of Pharoh, Elias, by the Life of Elias, and the Sionamite by the Life of Eliahu. Neither doth our Saviour (as some think) declare such Oaths to be leis lawful, or leis binding, than those whereby God himself was invoked: But observing that the Jews did not so regard such Oaths (in an opinion, haply, not unlike to his who saith, Sceptrum non putat esse Deos, That he did not believe the Scepter to be the Gods. He shews, that even these are true Oaths, and as binding as those that are made in the name of the true God. It was very well said of Lupin, He that swearth by his own safety, seems to swear by God, because he hath respect to some Divine power that prefers him. So our Blessed Saviour telleth us, That he that swearth by the Temple, swearth by him that presides therein; and he that swearth by Heaven, swearth by God who dwelleth there. But the Jewish Rabbin in Christ's time, were of opinion, That an Oath made by the Creatures did not bind, unleas when some punishment was added thereunto, as if the thing by which they were confracted unto God; so that an Oath by the Temple was nothing, but an Oath by the Gold of the Temple was binding: An Oath by the Altar was invalid, but an Oath by the Gift on the Altar was inviolable: And this Oath they called κοπάπις, or an Oath by the Gift, whereof mention is made, not only in the Story of Matthew, but amongst the Tyran Laws, as Josephus writes in his Diapicts against Apian. But this opinion of the Pharisees being erroneous, our Saviour refutes in Mat. 5. And Tertullian informs us, That the ancient Christians were wont to swear by the Life of their Prince, which in their esteem was more revereved than all their Gods. And in Paganism we find the form of the Oath given unto the Soldiers which were Chirllians, wherein they swear, Not only by God, but by the Life of their Emperors, which according to the Ordinance of God, is a thing to be defir'd and prayed for by all mankind.

Yea if a man swear by such as are false Gods, yet is he thereby bound, because though under a false Notion, yet in the general he invokes the Deity: And therefore the True God in case he forewear, doth so interpret it as if done in contempt of himself. And although we fea that holy men have seldom admitted of Oaths in that form, and much leas have taken such Oaths themselves, yet if we cannot prevail with those with whom we have to do, to swear by the True God, we may enter into League with them, taking for confirmation their Oaths in such a form as is usual among them. An Example whereof of we have in the League made between Jacob and Laban, Gen. 31. 53. Whereupon St. Augustin thus infers; Et qui per lapidem jurat, si falsum jurat, perjures et; He that breaks a Pillar or a Stone as witness, if to what he knows, to be false, is guilty of Perjury. For though Non audit te laps humen, nemini de Deo fallantem; The Stone heareth thee not when thou speakest, yet God will certainly judge thee when thou deceivest. (Moreover, He that sweareth by a false God, yet thinkes the God he sweareth by to be the True God, may be believed upon that Oath, and if that Oath refer to things just and honest, he that makes a League with him upon that Oath, Non praeceps illius se saciat (faith St. Augustin) doet non parere with him of his sin:
though he swear by Devils; but of that good agreement which by that Oath is confirmed. And therefore St. Augufin in the same place concludes, that Minus maliem effe, per falsior Deos veraciter juravit, quam per Deum verum fallaciter; it is a better fit to swear truly by false Gods, than to swear falsely by the True God. For the more holy the Perfon is by whom we swear, the more execrable is the fin, and the greater is the punishment if we forswear.

The principal effect of an Oath is to deterimine all fervices: So the Author to the Hebrews, *An Oath for Confirmation is the end of all Controversies.* Not much unlike is that of Philo, who fays, The greateft auftance of Oaths is, that neither Gracians or Barbarians can give, and which no Age can cancel, it being to their sworn Certainties and Promifes, both parties bring in the Gods for their Support: An Oath, faith Philo, is the greateft and strongest pledge that can be given by men, both of their fidelity and veracity. He therefore fays, that he fows, ought to be careful of two things: First, That his Heart contents to what his Tongue utters, *Chryfippus terms, emmippayt.* Secondly, That his deeds be fuitable to his Promifes, which he calls *exeiwpyt.* He that fends in the former, is said *adipaytov,* which is forbidden Exod. 20. And he that fends in the latter, is faid *exeiwpyt,* forbidden to care for the Words that we ove to the Name of God, not to be carefully observed. We read that the Kings of Israel were sharply reproved by the Prophets and punished by God himfelf, for not keeping their faith sworn to the King of Babylon, Exod. 17. 12, 13, 14, and to by Jeremy, Jer. 29. 7. And Cicero highly commends Pomponius the Tribune for observing his Oath, though wrung from him by terror: *Tantum temporibus illis jufurjandum eft; Eum ut jufurjandum, invenio.* So great was the reverence which in those times was given unto Oaths. So that not only Romans but well in rendering himself a Prisoner to the Carthaginians, but those ten men also (recorded by Cicero) in returning to Hannibal, by reason of their Oaths given in both cafe. He that is this practised among publick enemies only, but generally among all: For it is not the quality of the perfon to whom we swear, but the fear and reverence of God whom we invoke, as a Witness and an Avenger of what we swear, that creates this Obligation. It was an error in Cicero to hold it no perjury, *Si pronomus palium pro capit no attulitis, nulla fraus est, ne fieri juratum id non feceris,* de Offic. lib. 3. Though an oath did not pay the mone, which he promis'd by Oath to Robbers for saving his life: Because a Pyrate is not a particular enemy to this or that Nation, but a common enemy to all mankind, *Car non esse fede debeat, ne jufurjandum commove; With whom, faith he, we ought not to keep either faith or common Oath.* The very fame he elsewhere faith of Tyrants, namely, that the Romans were not obliged by any Oaths or Promifes they made to or with them: For though the difference be vast between an Enemy and a Pyrate, yet will not that difference much alter the cafe, where we have to do with God and not with men. And though the condition of the perfon be fuch, as that he cannot claim a Right in what is fo promis'd, yet to perform it being sworn, is a duty that we owe to God: And therefore is an Oath termed a Vow, because being made to God, we fland obliged before him to keep it. Neither can we grant what Cicero afferts, That there is no Society of Right with a Pyrate or Robber: For by the Law of Nations, whatfoever is depofited before us by a Pyrate, ought to be reforced to him, of the owner of it doth not appear, as Triphonius rightly flates this Quotation. Wherefore neither can we approve of their opinion, who think it fufficient to lay down the random which he hath sworn to pay: So that it is lawful for him to take it away again, becaufe when we have to do with God, we ought to deal finely and sincerely, fo that it may have fome effect. And better it is to hear a temporal los, than to provoke God by the breach of our Vow: For as Plutarch observes, *Qui juramento hisdem circumvent, est onerit illum a fetemtu,* Deum commenfe; *He that circumvent an Enemy by a false Oath, plainly difeovereth that he fears his enemy, but defipeth God.* (Yet that what is fo paid, may by a due courfe of Law be recovered, notwithstanding
standing our Oath, was the opinion of Aquinas.) And therefore the Soldier who having leave to depart upon his Oath given to return, though he came privately back, and then departed, did not thereby in the judgment of the Roman Senate, satisfaç his Oath. (Yet if a man do haply break his Faith with a Pyrate or a Robber, whether sworn or unwownik, he shall thereby incur no penalty amongst other Nations: For generally all Nations in detestation of these men, whom they account as common enemies to Humane Society, are pleased to connive at whatsoever is (though unjustly) done against them: For they that break the Commonwealth and League that there is between all mankind, are common enemies, and can have no right by the Law of Nations.)

But it is farther questioned, whether we ought to keep Faith with them who keep not theirs with us? To which I answer, that of Accius may be in this fence approved of, namely,

T. — Thy Faith thou broken hast,
A. Which I here gave, nor to the Faithless give.

If our promis made and confirmed by Oath, were manifestly grounded on some other promise, which was as a condition whereunto ours related, then that condition being not performed, makes void our promise though confirmed by Oath. But if the two promises were of several kinds, and did not mutually respect each other, then each promise is to be kept by him that swears, without any respect had to what the other doth. And hence it is, that Silius doth highly extolls the Fact of Regulus, in that he kept his Faith with the Carthaginians, who had been so often known to break theirs with the Romans. A manifest inequality in Contracts, doth naturally afford cause sufficient either to reform or relinquent, as I have already proved. And although the Law of Nations hath changed somewhat herein, yet by the Civil Law, which is in force where both parties are of the same people, recourse is often had to that which by the Law of Nature is allowed, as we have also elsewere shewed. But yet if the Contract be bound up by an Oath, notwithstanding this inequality, our Faith given unto God must be observed. The Psalmist gives this Character of a good man, Psal. 15. That if he swear to his Neighbour, he disappoint him not, though it be to his own disadvantage.

And here also it is to be noted, that where no Right is transferred to the person with whom we have to do by reason of some such defect as is aforesaid, but only in respect of the Oath that we have made to God, there the hire of him that made the Oath is not bound: For although, Transcript bona cum more, The goods of the deceased do descend upon the heir with the debts which he owed; I mean those Goods which are used in commerce with men; yet do not the debts of more Piety, Gratitude, or Fidelity, oblige his Children: For these do not appertain unto that Right, which among men is strictly so called, as I have elsewhere shewed.

Moreover where the Promise concerns no Right to the Perfon, yet if being sworn it seems to respect another’s profit, if that man will not accept thereof, or if he be willing to release the Promiser, the Oath shall not bind him: So also if the Quality of the person ceaht in reference whereunto a man swears, then the Oath made to that Perfon in relation to that Quality, is of no force. As if a Magistrate shall recede from his dignity, and become a private man, the Obligation made by Oath to him ceahteth: As Curio rightly informs Dominius his Soldiers, who encamped at the Oath they had formerly taken. How is it possible that you (faith he) should be bound by Oath unto him, who having thrown away the Ensigns of Sovereignty, and renounced his Kingdom, is now become a private man and a Prisoner to a strange Prince: And by and by he adds, That the Oath had lost its obliging power by the loss of the Princes freedom.

Another Question is sometimes made, Whether an Act done contrary to an Oath, be unlawful only or void? Where we must differ: For if our Faith only be engaged, the Act that is done contrary to our Oath shall stand good as in Testaments and Bargains and Sales. But in case the Oath be so framed, that it comprehends an utter abdication of any power to do that Act, then shall the Oath prevail, and the subsequent Act be made void. Now these things do naturally attend any Oath, whereby we may easily judge of the Oaths of Kings, and of other Sovereigns to one another, when the Act is not subject to the Laws or Customs of the place.

Now let us see what power our Superiors, namely, Kings, Princes, Masters, and Husband, have, in things that concern them in their respective Rights, over their several Relations: And first we must know, That the Acts of our Superiors cannot make an Oath that is truly obligatory, void; so that it ought not to be fulfilled: For this would be repugnant both to Natural and Divine Right; but because all our Actions are not fully in our own power, but so as they have some dependence on our Superiors, therefore we grant that our Superiors have a twofold power over us, concerning that which is sworn; the
Of Oaths.

BOOK II.

The power to abrogate from Oaths in whom anciently.

XXI.

What manner of Oath Chrift hath forbidden.

James 5. 12.
Rom. 1. 9.
5. 1.
2 Cor. 1.23.
11. 51.
Phil. 1. 8.
1 Thess. 11. 9.
1 Tim. 11. 7.

And here by the way we must observe, that what is said in the Precepts of Chrift, and by St. James, concerning our not swearing at all, doth not properly belong to afftery Oaths, whereof we have several examples in St. Paul, but unto such as are profecory for a time to come, which is uncertain. And this is evident by the opposition in the very words of Chrift, I have heard is said to them of Old, Thou shalt not swear; but thou shalt pay thy vows unto the Lord. But I say unto you, swear not at all. And by the reason that is added by St. James, That ye be not found to be deceivers. For so the word üμαρτος founds among the Greeks, as will appear by Job 54. 30, and Mat. 24. 57. The same may efly be evinced by our Saviours subfequent words, Let your speech be Yeas, Nay nay: which St. James thus expounds, Let your yea, be yea, and your nay, be nay: which is a plain Figure, which the Rhetoricians call παραλαβας. The former yea, signifying the promise made, the latter yea, the fulfilling of that promise. For this word rei, (i.e.) yea, is an Adverb of yielding, granting, or promising, and is expreft by Amen, Aper. 1. 7. The Roman Lawyers expref it by υδασατο, and apsodis, which is an affuring, or an allenting to that which is asked of us. It is used for the fulfilling of a promise by St. Paul, 2 Cor. 1. 20. Where he faith that all the promises of God in Chrif are yea, and Amen. Hence anfith that old Heb. Adage, An honest mans yea, is yea, and his no, is no: But on the contrary, he whose words and deeds do not accord, by them faid to be rei σε και σε, sometimes off, and sometimes on, as 2 Cor. 1. 18, 19. That is, their rei is 8, and their 8 rei, their yea is no, and their no is yea; the meaning whereof is, that they are inconsistent, unfefted, al- ways changing. So St. Paul himself expounds it, for when they changed him with liey, he excufeth himself saying, that his speech to them was not yea and no, but as to him- self it was always yea. Pelfus among the various significations of the word Nuncum writes thus, Some there are that think that it is derived from the Greek, rei 8 8 8, and so signifies a wavering man. Now if rei 8 8 8, yea and no, signifies lightnefs or inconftancy; it will follow, that yea, yea, and no, no, signifies feftednefs, or confancy. So that our Saviours words signifie no more than what Philo's the few did, It is an exceil
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lent thing (faith he) and most agreeable to Rational men, so to accustom themselves to speak truth. That their bare words may carry as much authority as other men’s Oaths. And in another place he faith, That a good man’s word is as firm, immutables, and void of deceit, as if he had confirmed it with an Oath. So likewise Josephus testifies, of the Eleni, That whatsoever they affirmed upon their words, was as true as if they had affirmed it upon their Oaths. And therefore to swear, was unto them superfluous. And from thee Eleni, or from those Jews that followed them, Pythagoras seems to have learnt it where he faith, We must not swear by the Gods, but every man should be so careful of his word and credit, that he may be believed without an Oath. It was the advice of Curryvome, If thou dost believe that he with whom thou hast to deal, is honest and faithful, urge him not to swear; but if thou suspect him for a lyar, urge him not to forswear. The Scythians in Curitius told Alexander, That it was not the custom of the Scythians, Gratian jurando fancere, to purchase his favour or establish their own peace by Oaths. For, faith Curtius, Colendo Fiden, Scythe jurant: The Scythians are so great admirers of truth and Fidelity, that their bare words do oblige them as firmly as (and their deeds confirm their promises, more than) their Oaths. Cicero in his Oration for Rufius Comedus tells us, that look what punishments the Gods awarded to a perjured person, the same they awarded to a Lyer. For it was not the form of words, wherein the Oath was comprehended, that provoked the Gods unto vengeance; but the malice and perfidiousness of the heart, wherein all Treacheries and forgeries are minted. It is excellent Counsel that Solon gives us, That we should have so great a regard to our own honesty, that our words may be as Authoritative and convincing as our Oaths. Thus Clemens Alexandrinus describes a just man, to be one, that evidence the truth of his promises, by the sincerity and constancy of his words and actions. Cicero records it of a certain Citizen of Athens, that being known to be of a Religious, and upright conversation, and being to give his publick testimony upon Oath, was not permitted so to do; but as he approached near the Altar to that purpose, all the Judges with one voice cried out, That he should not swear, being unwilling to give more credit to his Oath, than to his word. Very pertinent to the meaning of our Saviour where he faith, Swear not at all, is that saying of Hierocles, He that in the beginning said, Thou shalt reverence an Oath; did therein enjoin us to abstain from swearing, concerning such thing as are coming, and of uncertain events. For such things are so mutable, and of so small an account, that they are not worthy an Oath, neither is it safe to swear about them. And Libanius infers this amongst many other Vertues, for which he highly extols a Christian Emperor, That he was so far from Perjury, that he feared to swear to what he knew to be truth; A perjurio tantum abst, ut eum vera jurare vereatur.

Therefore in some Nations, instead of Oaths, they give unto each other their right hands; which among the Persians is the strongest assurance of Faith that can be given. And among other people they oblige themselves by other signs, and that so strongly, that unless he that shall so oblige himself, do fulfill his promise, he is held as execrable, as if perjured. But especially of Kings and Princes, it is usually said, that their faith given is as good as an Oath. For such they should be, that they may lay with Augustus, Bono fidei fun, I have a clear Reputation: And with Eumenes, I had rather lose my life than break my Faith. Whereunto Gumher alludes, where he faith:

——No Oath more Sacred than the word of Kings.

Whereunto we may add that of Alexia Comimis:

——If I but had this firm, as though I swear.

This testimony Iperates gives of King Evagrius, That he kept his word as Religiously as he did his Oath. Cicero in his Oration for King Dejotarus highly commends Caesar for this, That if he gave to any man his right hand, it was sufficient to confirm any Promise that he made, whether in Peace or War. And in those Heroick times, The elevation of the Royal Scepter was equivalent to the Oath of a King, as Aristotele notes.
C H A P. XIV.

Of the Promises, Contracts and Oaths of Soveraign Princes and States.

I. The opinion of some, who hold that Restitutions to the full, arising from the Civil Law, appertain to the acts of Kings as such, rejected: as also this, that Kings are not bound by their own Oaths.

II. To what acts of Kings, the Laws extend: explained by definition.

III. When a King is bound by his Oath: and when not.

IV. How far forth a King is bound to what he hath promised without cause.

V. The use of what hath been said concerning the force of the Laws, about the Contracts of Kings.

VI. In what sense a King may be said to be obliged to his Subjects by the Law of Nature only, or even by the Civil Law.

VII. A Right gained to Subjects, how it may lawfully be taken away.

VIII. The definition of Things, gained by the Law of Nature, and by the Civil Law, rejected.

IX. The Contracts of Kings, whether they be Laws, and when.

X. How by the Contracts of Kings, they that inherit all his Goods, stand bound:

XI. How by those Contracts, they that succeed in the Kingdom may stand bound:

XII. And how far.

XIII. The free Grants of Kings, when revocable, and when not.

XIV. Whether the true King be bound by the Contracts of them that invade, or infringe the Kingdom.
Nature determine the case; yet with this Provifo, That where the Laws do make void any private mans act, not in favour to the person acting, but as his punishment; those Laws are of no force against the acts of Kings, nor indeed, any other Penal Laws, nor any thing else that implies *vim cogendi*, a power Coercive. For to punish and to compel, cannot proceed but from two different and distant wills, and so from distinct persons; neither can the compeller, and the compelled, be any one person, though under diverse respects.

A King may make void his own Oath, as a private man, *anteecessor*, &c. If by a former Oath, he hath deprived himself of the power to oblige himself by Oath, to any such thing: but consequentially he cannot, for herein also is required a distinction of persons. Besides, to every such abolition it is requisite, that in the very Oath before taken there should have been this limitation or exception (either express or implied) *Nisi superior voluntas, Unlefs my Prince command the contrary*. Which in the Oath of a King cannot be admitted, because this were to make a King superior to himself, or to make his Oath still to depend upon his own will, which is contrary to the nature of an Oath. And whereas an Oath, though made, may confer no Right to another, by reason of some default in that person; yet is he that wareth, bound before God, to make good what he hath so promised, as is before said. And thus also are Kings bound by their Oaths, which they make, no less than private men: though *Bodanes* thought otherwise.

We have likewise already hewed, That full and absolute Promises being accepted of, do naturally transfer our Right to another. Now this holds as well in Kings as in private men. Their opinion therefore is not to be admitted, who say that Kings are not bound by their promises which they make without good caufe; which notwithstanding may in some fene be true, as we shall shew anon.

That the Civil Laws of a Kingdom have no power over the Covenants and Contracts of a King, is well acknowledged by *Vasquinus*. But that which he would thence infer, namely, that what is by him bought or sold for no price certain, or what is by him let or taken to hire without any Rent agreed on; or what he shall give away in Fee, without any Writing or Grant under his hand, shall be of force, we cannot admit: For these acts are done by him, not as a King, but as any private person; and over such acts as these, not only the Civil Laws of that Nation, but even the Municipal Laws of that City wherein the King resides, have power: because the King for some special reason placeth himself there as a Member of that Corporation, unless it shall appear by good circumstances, that it was his will, that those acts of his should be exempted from the power of those Laws. But that other example brought by the same *Vasquinus*, concerning a promise in any way made, doth very well agree, and may be explained by what hath been before said.

That which Civilians do generally affirm, that the Covenants which a King entrith into with his Subjects, do oblige by the Law of Nature only, and not by the Civil Law, is somewhat obscure. For that is sometimes corruptly said by the Law-givers, naturally to oblige, which is only agreeable to the rules of honesty, but yet cannot properly be said to be due: As for an Executor to pay the entire Legacies without Dedication, though he have not the fourth part of the Testators Estate left him; or to pay a just Debt, though the Creditor be made by the Law incapable of receiving it; or to require a Courtefe received; all which can no ways be recovered by any action at Law. Sometimes again, That is more properly said naturally to oblige, which is indeed truly obligatory, whether it be as transfers a Right unto another as in Contracts; or such as transfers none, as in a full and firm Pollicitation. *Maimondis* the Jew doth very aptly distinguish between these three: Whatever cometh more than is due, falls under the notion of mercy, which is but the overflowings of a good nature, such are good works done meere out of bounty and munificence. Secondly, To perform what we are strictly bound to do, which the Hebrews call judgement; but to do that which is in honesty and Confidence only we ought to do, this they call Righteousness or Equity. Which three some Expositors upon that of Matt. 21. 23. render by mercy, judgement, and fidelity, whereby the word, *vis*, the Greeks do commonly understand Righteousness; and by the word *justice*, judgment, that which we are strictly obliged to do, as we may find, *Matt. 1. 8*, & 32. Moreover a man may be said to be civilly obliged by his own act, either in this sense, that the Obligation spring not from the mere Right of Nature, but from a Civil Right, or from both; or in such a sense, as that an action at the Civil Law may be against him. We conclude therefore, that from the Covenants and Promises which a King makes with his people, there may arise such a true and proper Obligation, as may confer a Right unto them: For such is the Nature both of Promises and Contracts, even between God and Men, as we have shewed already. If the acts of a King be such as may be done by any other man, the Civil Laws shall bind him; but if they be such as are done by him merely as a King, the Civil Laws do not reach him, which difference was
not by *Vaspius* sufficiently observed. Nevertheless an action may arise from either of these acts, so far forth as to evidence the Right of the Creditor; but no enforcement there can be, by reason of the quality or condition of the adverse party. For that Subjects should compel him whose Subjects they are, is not lawful, which Equals may do against Equals by the Right of nature, and Superiors against Inferiors by the Civil Laws.

But this also must be noted, that a King may take away the Right of his Subjects two ways, either by way of punishment, or by Vertue of his Sovereign Power. But if he do it this latter way, it must be (in the first place) for some publick profit, and then also the Subject must receive, if it be possible, a just satisfaction out of the Common fock for the lose he shall sustain; this therefore as it holds in other things, so also in that Right, that is gained, by either Promise or Contract.

Neither doth it make any alteration in the case, whether the Right of the Subject were acquired by the Law of Nature, or by the Civil Law. For the King hath an equal Right to both, nor can either of them be taken away from the Subject without cause. For it is against natural Right that what Dominion or other Right a man hath lawfully gained to himself, he should be caufefully deprived of. And if a King should do it, he ought without doubt to make restitution, and to repair the damage that the Subject hath sustained, because he doth thereby violate the true Right of his Subject. And herein is the Right of Strangers much different from that of Subjects; for the Right of Strangers, and of such as in no respect are Subjects, can by no means be under that superior Right of a King, as the Rights of Subjects are for the publick good: unless by way of Punishment, whereof hereafter.

From whence we may collect, upon how fandy a Foundation they build, who hold all the Contracts of Kings to be Laws. For from the Laws there arifeth no Right against a King to any man. Therefore if the King should think fit to repeal thole Laws, he cannot be fatisfied to injure any man: Yet if he do it without goodcaufe, he gives juft caufe of offence. But from Promises and Contracts a man may claim a Right. For by Contracts the Contractors only are bound, but by the Laws, all that are Subjects. Yet may fome things be of a mixt nature: Partly by Contracts, and partly by the Laws, as when a King contracts with a Neighbour King, or with Farmers of his Revenues, which he presently proclaims a Law, so far forth as it contains what is by his Subjects to be observed.

Let us now proceed to the Succifors, concerning whom we are to distinguish between thofe that are to inherit all the goods of the deceafed King together with his Kingdom; as he that receives a Patrimonial Kingdom, either by his Testament, or from an Intestate: and between thofethat fucceed in the Kingdom only, either by a new Election, or by Precept; and that either in imitation of other vulgar inheritances, or otherwise; or whether they fucceed by any mixt Right. For they that inherit all the goods, with the Kingdom, are without doubt obliged to perform all the Contracts and Promises of the deceafed King. And that the goods of the deceafed fhould fland obliged for his personal Debts, is as ancient as Dominions it fell.

But how far they that fucceed to the Kingdom only, or to the goods in part, but to the Kingdom entirely, are obliged by the Covenants and Contracts of their Predecessors, is of worthy to be difficult, as it hath hitherto been confufedly handled. They that fucceed in the Kingdom but not as Heirs, are not immediately bound by the Covenants and Contracts of their Predecessors; because the Title they have, they receive not from him but from the people; whether that Succession fall like other vulgar inheritances, to him that is nearest of kin to the deceafed, or to thole that are more remote. But mediatly (i. e.) by the City that chose him, such Successors also are bound: which shall be thus understood. Every Society, no les than every particular perfon hath a power to oblige it fel, either by it fel, or by its Major part. This Right every Society may transfer, either expressly, or by neceffary confequence; that is, by transferring the Empire: for in Morals he that gives the end, gives all things conducing to the end.

And yet fhoit not this be boundles; neither is it at all neceffary to the good Government of a Nation, that this obliying power should be infinite, no more than that of a Guardian is, but to far forth only as the Nature of that power requires. *Tutor Domin~ lực habitat, cum ven administrat, non cum pullipum fociat.* The Guardian (faith Julian) hath a power equal to the Lord, whilst he orders the estate prudently, but not, when he wastes it. And in this fene is that of *Ulpian* to be underftood. Every Society shall be bound by the acts of their Governors, be the agreement profitable, or damagable to that Society: yet notwithstanding, is not he that negotiates the publick affairs, to be strictly tied up to this rule as some hold, fo that his act shall then only be held firm, and ratified, when the Commonwealth is meliorated by it. For to reduce a Prince to fuch fraits would be dangerous to the Commonwealth. Neither is it likely, that when the people transferr'd the Government
ment upon him, they intended so to retain him. But what the Roman Emperors answered
in the cause of their City, That what was transferred by the Magistrate, should be of force
in doubtful matters, but not, when that which is clearly due to the City is rathery given
away or forgiven; the same answer may and ought to be given to this question, in
the behalf of the whole body of the people, observing a due proportion. For, as it is not
every Law that obligeth Subjects; for besides those which command things unlawful,
some Laws are evidently absurd, and foolish, as that Law of Cabodes King of Persis,
recorded by Procopius; and Agathias. Neither is it congruous to reason, (as Peter
Ambassador of Justinian the Second, told Coesarius King of Persis, treating about some
things, which Justinian feared long before to promise to the Saracens, That a Common-
wealth should; forever be condemned, for one simple Law or custom introduced, or enacted
by one man, although an Emperor. So also the Contracts of Princes do bind their Sub-
jects, if they have any probable reason to justify them, which in doubtful cases ought
be presumed, in respect of the wisdom, and authority of those that made them.
And it is much safer thus to distinguish of them, than (as some do) by the greater or
lesser damage, that arises to the Commonwealth by them. For we are not so much to
regard the event of such Contracts, as the reasons whereupon they were grounded;
which if probable the people shall be bound by them, if by any accident they shall begin to
be free people; and so shall they that are Successors as being for the time, the heads of the
people: For if the people being free, shall make any Contract or agreement, their
Kings that shall afterwards Reign, shall thereby be bound, although he receive the King-
dom in the fullest Right. The Emperor Titus is highly commended for this, That he
would not endure to be solicited to confirm any thing that his Predecessors had granted,
thinking it but reasonable, That if he expected that his Successors should be bound
by his acts, he also should be obliged by the acts of their Predecessors: Whereas Tibe-
rianus (and they that succeeded him) did never hold the Grants of his Predecessors to
be good, unless they themselves had granted the same, to the same persons. That excep-
tional Emperor Nerva, following the example of Titus, in that Edict recorded by Pliny
speaks thus, Let not any man conceive, That what he hath got from any of my Predecessors ei-
ther privately, or publicly, shall by me be so far reform'd, as that they shall be indebted some
though but to confirm it, neither shall they need any mans Intervention to obtain it. But when
Tacitus had declared, how Vitellius had torn the Empire in pieces, without any regard
had to Potestity, (the common people flocking about him, and courting him for his
profuse gifts; and some others hoping for a good purchase, tempting him with ready
money) at length adds this, Aper fugientes, caeca habeantur, qua neque dari neque accipii,
salva republica potestas; That such gifts were always by wise men accounted void, which
could neither be given, nor received without endangering the Commonwealth. Which very fancying
of Tacitus, is much commended by Maritima, and applied to the vast and unbounded
Beneficence of Frederick King of Naples, who gave away, as Philip de Comines relates,
not his own Crown Lands only, but other mens allo, according as his fancy led him.
The same may very fitly be applied to the question in hand, and therefore Galba made
no scruple of revoking the Grants of Nero, even from those that had purchased them,
leaving the Tenth part only unto them: as Tacitus and Plutarch tells us. So did Bajillus
the Macedonian Emperor, recover all that the Emperor Michael had given away.
Whereof Zonaras thus: That it was unanimously agreed, that They that had received
moneys without any probable cause, should restore it, some wholly, and others one half.
The like did Charles the Eighth of France, revoke all that Lewis the Eleventh had prodi-
gally, given not excepting his Donatives to the Church: As Comminius tells us. This also
may here be added, if any such accident fall out wherein a Contract made by a King
is discovered to be not only quadrable, but pernicious to the Commonwealth, so
that at the time, when the said Contract was so made, had it been applied to that
cafe, it had been judged unlawful and unjust; Then may that Contract be not so much
revoked, as declared to be no longer binding, as if made with condition, of being void in
that case, without which condition it could not have been justly made. Thus did that
wife Queen Elizabeth revoke some privileges granted to the Hans-Towns, by her Prede-
cessors, when they began to exact them as due by rigour of Law, and not as granted
by the meer favour of the Prince: Alluding that privileges granted by Princes to their Subjects, much more to Strangers, might according to the times for the benefit
of the Commonwealth and other caues be lawfully suspenden, yea revoked and made
void. And when the same Queen had drawn a dangerous War upon her self, for alligning
the Hollanders, who refused to repay her those vast sums expended for their ten years
defence, upon pretence that by her Contract with them, that money was not due till
the War was ended, and that till then she could not recede from her contract: She prudently
replied, That all Contracts between Princes, were to be understood to admit of an
interpretation of sincere fidelity. Neither is any Prince bound by his Contracts, when for

just cause that Contract turneth to the publick Detriment. That the peace is not broken, though a Prince recede from his Contract, when it is done by an accident of a new cafe, or when it comes to a new cafe, which had it been thought on had otherwise been provided against. Lastly, That a Prince is not bound by any Contract though solemnly made, if it tend to the Detriment of the Commonwealth: For that a Prince is more strongly bound to the Commonwealth, than to his own Promise, as Mr. Camden records. And what is here said of Contracts is true also in the Alienation of the peoples money, and of any other things, which the King hath by Law a power to alienate, for the publick good. For herein also is this distinction to be observed, where there is any probable reason for giving, or otherwise alienating what is the peoples. But in case the King shall by any Contract go about to alienate any part of his Kingdom, or of the Royal Patrimony, beyond what is permitted unto him, such a Contract shall be of no force, as being made of that which was not his to dispose of. As much may be said of such Kingdoms as are limited and restrained, if the people have exempted any, either matter or kind of acts from the power of their King. For to make such acts valid, the consent of the people, or their Representatives, is necessarily required; as we have already shewed when we discoursed of alienations. Now these distinctions being observed, it is no difficult matter to judge, Whether the exceptions of Kings who refuse to pay their Predecessors Debts, whose Heirs they are not, be just or unjust; whereof we may read many examples in Bodin.

Neither is that which some affirm, to be admitted without a distinction, namely, that the benefits of Princes which are freely and liberally granted, may at any time be revoked. For some benefits, a King may give out of what is his own; and which were it not for this clause, at the prayer or requent of the Grant, might well pass for a perfect Donative. Now these cannot be revoked unless from Subjects by way of punishment, or for publick good, for which also satisfaction must be given out of the publick Stock, if possible. But other benefits there are which only take away the binding power of the Law, without any Contract; and these are revocable. For as a Law universally taken away, may always be universally restored; so also being particularly taken away, it may be particularly restored. For no Right is here acquired against the Law-maker.

But by such Contracts as are made by Usurpers, or such as without any just title invade a Kingdom, neither the people nor their lawful Prince are obliged. For such have no right at all to bind them: Yet even these also shall be bound by those Contracts, so far as they are enriched by those Contracts.
Of Leagues and Sponfions.

I. Of Publick Agreement: what they are:
II. Divided into Leagues, Sponfions, and other Conventions.
III. How these differ, and how far Sponfions oblige.
IV. Menippus bis division of Leagues rejected.
V. Leagues divided into such as oblige unto things agreeable to the Law of Nature, and from whence this arises.
VI. And unto things thereunto added, which are either equal:
VII. Or such as are unequal, which again are divided.
VIII. Leagues made between tho' of a different Religion, by the Law of Nature, are lawful.
IX. Nor are they universally forbidden by the Hebrew Law.
X. Nor by the Christian Law.
XI. Causes concerning such Leagues.
XII. All Christians are obliged to enter into a League against such as are enemies to Christianity.
XIII. If diverse of our Confederates are at War, which we ought to assist: explained by a distinction.
XIV. Whether a League may be understood to be renewed tacitly.
XV. Whether the breach by one Party, do free the other from being obliged.
XVI. How far the Sponfions stand obliged; in case what they undertake for, be refused.
XVII. Whether a Sponfion being known, but not refused, do oblige by silence: This explained by a distinction.

Leagues and Sponfions.

All agreements are by Opfian divided into such as are publick or private. The publick he expounds, not as some think, by a Definition, but by Examples. The First whereof is, that whereupon a Peace is concluded. The Second is, that whereon the Generals on both sides do agree among themselves about some things touching the War. By Publick Agreements he understands those which cannot be made, but by such as have the Right of Empire either Greater or Lesser, whereby it is distinguished not only from the Contracts of private persons, but from the Contracts which Kings make in their private affairs; although even from these private Contracts, a War is sometimes occasioned, but oftener from the publick. Wherefore since we have sufficiently treated of Conventions in general, we will add thereto some things concerning this kind, which of all others is the most excellent.

Now these publick Conventions which the Greeks call Εὐθέμες, we may divide into Leagues, Sponfions, and other Paftions.

The difference between Leagues and Sponfions we may learn out of the ninth Book of Livy, where he tells us, That Leagues are such agreements as are made by the Command of the Supreme power, and whereby the whole Nation is made liable to the wrath of God, if they infringe it. And this among the Romans was wont to be performed by Heraulds in the presence of the King of the Heraulds; but a Sponfion is where the Generals having no order from the Supreme Power to conclude any thing about such a matter, do yet promise and undertake something concerning it. In Sallust we read thus, 'The Senate (as it is very fit) have decreed, That without their, and the peoples Command, no League shall be made.' Hieronymus King of Syracus (as Livy relates) contracted friendship with Hannibal; but he sent afterwards to Carthage to make of that Alliance, a perfect League. Wherefore that of Seneca the Father, where he faith, [In that the Emperor struck up a League, the Roman people may be said to strike it up, and to be concluded by it] must be referred to those ancient Confuls or Generals who had received special Order from the Senate and People of Rome to do. But in Monarchical Estates, the sole power of making Leagues is in the King. According to that of Euripides,

---Adrastum hunc opus.
Jurare: Namque est jus habet regni potens;
Ut civitatem sedere obturing at jus.

---This Adrastus ought to swear, I say,
Who being their Sovereign, the whole City may Oblige, this League for ever to obey.

Now,
Now as Inferior Magistrates cannot oblige the people, so neither can the minor part of the people oblige the whole: But let us here enquire how far forth they are bound, who not having the peoples Right, shall yet undertake that, which the people only have a Right to do. Some may think that if the Sponsors use their utmost endeavour to effect that which they have undertaken, they have preferred their Faith, according to what we have already said, of Promises made for the fact of a third perfon. But the nature of the business concerning which this Contract is made, requires a stricter obligation: For no man in Contracts, will either give or promise any thing of his own, but expects that something shall be performed unto him in lieu thereof. Whence it is, that by the Civil Law, which will not admit of one mans Promise for another mans fault, such a Promise shall amount unto a Confirmation of the things agreed on, and shall bind the Promiser to make good what the Prince or People refuse.

Menippus King Antiochus his Embassadour to the Romans, (as it is recorded by Livy and Diodorus Siculus) being led more by his own wit and curteisie than by the rules of Art, divided Leagues into three sorts: The first whereof is, When the Conqueror gives Laws to the Conquered, where it is in the Victors power to determine what the Conquered shall have, and how far he shall be punished. The Second is, When both parties being of equal power and success in the War, do agree in an amicable League on equal conditions. And then by agreement, things taken are on either side to be restored: And in case any man hath been disturb’d in his possessions during the War, the difference is to be composed, either according to ancient Right, or according to the mutual Profit and Convenience of both parties. The Third is, When they that never were Enemies do enter into a Social League between themselves, without either giving or receiving Laws on either side.

But we are to distinguish somewhat more accurately: As, in the first place, we may say that some Leagues require such things only as are congruous to the Law of Nature, others add something thereto. Leagues of the former kind are usually made, not only between Enemies at the end of a War, but of old, were both often made, and in some Fort necessary amongst those who before had never contracted for any thing. The ground whereof was, That that Principle of Natural Right, (which instructed us, that Nature had prudently linked together all mankind in a kind of strict Alliance: And therefore for one man to hurt another was impiety) was, as of old before the flood, to again some times after, by an universal corruption of manners so obliteratet, that it was held lawful to rob and spoil Foreigners; yea, though there were no Wars pre-claimed. So Caesar of the Germans, Latrocinia illam habens Insaniaem, qua extra fines juris Civitatisem juris: Look what Spoil and Robberies they committed without the bounds of their City, they held as no dishonour. The like Testimony Tacitus gives of them, with whom agrees that of Plutarch touching the Spaniards, Who (faith he) till that time thought it an honourable employment to spoil and plunder out of their own Territories: Nay, the Jews themselves refused to make satisfaction for damages done, unless to a Jew or a Confederat. whence that question in Homer (As Proctodes eftis? Are ye forangers (i.e.) such as live by the spoils of strangers) was an innocent and friendly Interrogation: For, faith the Scholiast upon that place, To prey upon strangers was then held an honourable employment. The very same we find in Thucydydes, with this addition, For this kind of life was not at that time insaniaem, but commendable. No more was Pyrrus upon the Seais until the Reign of Tarchun, as Justin testifieth. And this the Romans Law seem to justify. For if any thing had been taken by the Romans from any Nation with whom they had no commerce, hostipality, nor League of Amity, (for there were not accounted enemies) it was held by them as lawful prize:So if a Roman Citizen were found among them, or brought unto them they were immediately made Slaves. And in this case did their Law of Pollihny take place: The fame and no better quarter had those people being taken by the Romans. Thus we read that the Carystians before the Peloponnesian War, were no Enemies to the Athenians; but neither had they Peace with them nor any Truce, as by the Oration of the Corinthians in Thucydydes appears. So Salutis Speaks concerning Boecchius, Nobis nec pace nec belli cognoscere, That he was altogether unknown to the Romans by either Peace or War. And to rob and spoil much, was, in the opinion of Aristotle, laudable: And is so far warrantable by the Roman Laws, that the word Holys, which signifies an Enemy, did in the old Latin dialect signify nothing but a Stranger or Foreigner. Now under this kind of League, I comprehend these also, whereby Freedom of Commerce and the reception of strangers are on both sides allowed unto, as being agreeable to the Law of Nature, whereof we have treated above. And thus we shall finde these Leagues distinguished by Livy in that Oration which Arc in makes to the Achaianis, where he infuits not upon any League of Society, but upon that of Commerce, which consisteth in giving and receiving that from each other which was due by the Law of Nature; namely, That the Achaianis would forbear to receive into their protection the fugitive Servants of the Macedonians.
Macrobuates. Now all such Conventions the Greeks do strictly include under the word 

dion (i. e.) Peace, whereunto they oppose the word 

which is a League made by 

Sacrifices. 

Thofe Agreements which contain thofe addimations to thofe of Natural Right, are ei- 

eral or unequal; equal, when the Articles are the fame on both fides: Whereunto 

virgil alludes,

Nec mehi Regnapat, paribus sub Legibus ambas 

Invitata gentes Aeternas in Fader mitiam. 

Empire I claim not, but with equal Right, 

Both Nations will with checking Leagues unite. 

And thofe the Greeks sometimes term oevias, Leagues simply, foftimes Leagues upon 

equal conditions, as we read in Appian and Xenophon: But thofe that are made upon une-

qual conditions they call |ovores, becaufe made by Sacrifices: And as they repect 

the weaker party, |ovostyoxon, becaufe impos'd upon them upon hard conditions, which 

( as Demofhenes advieth ) are carefully to be avoided by all fuch as love their liberty, 

becaufe they approach too near to fubjection. Now both thofe kinds of Leagues are 

made either for Peace or for Society fake. Thofe equal Leagues of Peace are usually made 

for the refitution of Prifoners or Goods taken in War, or for mutual security, whereof 

we fhall fpake more at large anon, when we have occasion to fpake of the effects and 

consequences of War: Thofe equal Leagues of Society repect either mutual commerce, 

or an equal participating of the charge of a War, or fome other matters. Con- 

cerning Commerce, equal Covenants may be various, as namely, That no Culloms be 

paid on either fide, which we find to be one of the Articles agreed on in that ancient 

League made between the Romans and the Carthaginians, except only what was given 

to the Notary and to the Cryer: Or that no more fhould be except'd than what was 

at prefent paid, or not beyond fuch a rate. So alio in a Social War, That each party 

fhould contribute a like number of Foot or Horfe or Ships, and that, either againft all 

Nations, and in all Wars, whether offensive or defensive, which the Greeks called 

voxxopxar, as having the fame both Friends and Enemies; Examples whereof we often 

read in Livy: Or for the defence of their own bounds only, or limited to fuch a War 

only as is expref, or againft fuch an enemy, or againft all except their Allies, as in the 

League concluded between the Carthaginians and Macrobuates, recorded by Polybius: Or as 

the Romans covenanted with Antigonus and Demetrius againft all Enemies whatsoever, Pro- 

lomy only excepted. The like equal Leagues may be made, in repect of other things: 

As, That neither party fhould build any more Forts, confining on the Borders of the 

other Territories; or that neither of them fhall protect the others Subjects: or that 

neither of them fhall permit the others Enemies to march through their Countries. 

By what hath been faid of Leagues that are equal, we may easily difcover what is 

meant by fuch as are unequal. Which inequality may repect either the more power- 

ful party, or that which is weaker: From the stronger, as, when succours are promi- 

fed, but none required, or when more is granted, than is expected. From the weaker, 

as when harder conditions are impos'd on them than are jul, and thofe we call Manda- 

tory: And of thofe, fome tend to the weakening of the Empire, as in the second League 

made between the Romans and the Carthaginians, wherein it was provided, That the Car- 

thaginians fhould make no War without leave from the Romans. And from that time were 

the Carthaginians by that League, little better than Servants to the Romans:And to this alio 

we may reyer thofe conditional furrenders, faying that this is not fo properly a diminu- 

tion of the Empire, as a full tranflation of it to another. Yet is fuch an Agreement 

often fweptened with the name of a League, as Livy tells us, The Teates in Apulia 

made faid to the Romans, That they might enter into a League with them, not upon equal 

conditions, but that they might be under the dominion of the Romans. Some again tend not to 

the undermining of the Empire, but only impose grievous burthens upon the weaker 

party, and that either for a certain time only, or for continuance. For a certain time, 

as the defraying the charge of the Empire, the defmofifying of their Walls, the quitting 

certain places of strength; Or to give Holllage to deliver to fome Elephants, Ships, 

or the like. Others are permanent, as, That they bear all reversion to the Majesty and 

Empire of the other party, which how far it extends, we have elsewhere fwear. Con- 

fining upon this, That they account thofe as Friends or Enemies which the other party 

decides to be fo; alfo, that they permit no Army free paffage through their dominions 

that are the others Enemies. There are alfo fome lighter burthens somewhat laid upon 

them, as, That they fhall not rafe any Fort, nor build any City, nor lead an Army, 

nor traffick by Servants to fuch and fuch places, That they fhall not keep above 

such
such a number of Ships, That they shall make no War with such a people being Associates with the other party, That they shall not supply the others enemies with any manner of provisions, nor receive them though they come from other places; That they shall break their League, though formerly made with such a people: For examples of all these we find very frequent in the best Historians. Moreover, unequal Leagues are often made, not only between the Conquerors and the Conquered, as *Menippus* conceived, but also between people of unequal power, yea, amongst those Nations that never were at War against each other.

Concerning Leagues, it is frequently disputed, Whether they may be lawfully made with a people that are enemies to the true Religion: which if we respect the Law of Nature only, is not to be doubted. For that Law is so equally indulgent to all men, that it will not admit of any difference upon the score of Religion. The question then is, whether by the Law of God, it be lawful, or not? And thus we find it often controverted, by not only Divines, but some Lawyers, among whom are *Oldradus* and *Decianus*.

Let us therefore first look into the Old Testament, where we find, that such Leagues if Inoffensive, were before *Moses's* time lawful: For *Jacob* we find making such a League with *Laban* *. We purposefully omit that of *Abraham* and *Abimelech*, because it doth not clearly appear, that Abimelech was an Idolater. Neither did the Law given by *Moses* change any thing herein. But we find a strict prohibition given to the *Hebrews* concerning the *Egyptians*, That they should not treat with them as enemies, and yet without doubt they were Idolaters. But here we must beware, that we draw not the seven Nations which God had decreed to cast out of the Land of *Canaan* for their Idolatry, into a precedent, and from their and the Amalekites examples, create a general rule. For the reason why *Josaph* might not make a League with them, was not only because they were Idolaters, for so were the *Egyptians*; but because God had long before declared his purpose to cast them out, and to plant his own people in their room, according to his promise formerly made to *Abraham*, of which sentence the *Israelites* were but the Executors. And as to the League of Commerce, either for mutual, or either parties advantage, that such might be made with Heathenish people, we may safely conclude from those made by *David* and *Solomon* with King *Hiram*; Where this is worthy our observation, That it is said in Holy Writ, That this League was so made according to the wisdom that God had given him. And *David* being perjured by *Saul* fled to *Achish*, nor was he ever reproved for so doing. 'Tis true, that *Moses* doth every where command them to do good to their Country-men, and special care is taken to preferve them in love one another: And as true it is, that their very diet, and the whole manner of their lives was such, that it would not suffer them to have any familiarity with strangers. For as *Juvenal* observes, They were so morose, that they would not direct a stranger in his way; that is, they would not do a stranger the least of courtesies, though they might do it without the smallest pains or charge:

*Non monstraere viam, sedam nisi ferae colent.*

**Strangers shall not direct**

**Into their way; if not of their own Sect.**

The like doth *Tacitus* record of them, *Aptid epoet, sines obstinatos, misericordia in promptu, adversus omnes alios hostile edum*; Between themselves they were very faithful, and apt to shew mercy, but to all others they bare a mortal hatred. But because they were commanded to be thus charitable to their Brethren, therefore to conclude, that it was not lawful for them to do good unto strangers, will prove but ill confequence. But yet such were the corrupt Glories of the *Hebrew* Doctors, that they corrupted the *Jews*, that if they performed those duties of Justice and Charity to those of their own Nation, they had sufficiently fulfilled the Law; though to all others they were not uncivil only, but barbarous, as indeed they were. For we find it recorded of them by the Evangelist, that it was not their custom to eat, to drink, or to have any familiarity with Strangers. And thus through all Ages they have continued, as appears by the Characters given of them by all Historians. *Apollonius* *Molo* objects against them thus, *They admit of none amongst them, that agree not with them in matters of Religion, neither will they communicate with them in any thing.* Thus do the Friends of *Antiochus* in *Diodorus* brand them, *A people they are of all others the most unfaciable to strangers; for they account all such as enemies: And a little after, They will not eat with any other people, nor so much as salute or bid them farewell; such a general hatred they bear to all mankind.* The like testimonies doth *Philostratus* give of them: And in *Josaphus* we find it every where objected against them, That they were a people of all others the most uncivil, and the most unfaciable. But *Chirif*, who was every where most obvant of the Law, did by his own example teach them, that this was not

Yet herein we are to except, not only the seven Nations above mentioned, but the Ammonites and the Moabites, of whom we find it written thus, Thou shalt not seek their prosperity nor their good all thy days for ever. In which words the Israelites are forbidden to make any League of society or amity with them; yet it gives them no right to make war against them. Or haply this place of Deuteronomy may be better understood, according to the opinion of some of the Hebrew Doctors, as if it be not to seek a peace from them were forbidden, but not to accept thereof, when offered. Certain it is, they were forbidden to make War upon the Ammonites, Deut. 2. 19. neither did Jeophib accept it till they had obfolutely refused equal conditions of Peace; nor David till he was provoked thereunto by unflurable injuries.

The Question then refeth here, Whether it be lawful to enter into a Social War with Infidels? Before the Law given, that this was not unlawful, appears by the practice of Abraham, who affifted the wicked Solomites in their War. Neither did Moses change any thing herein, that we can read. Of the fame perifhation were the Asmonaens, who were both very skillful in the Law, and very strict observers of it, witnesses their religious obser-

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Of Leagues made with Idolaters.

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the scope of Moses, nor the sense of the Law, when he preferred the good Samaritan be-

before the Levite, and asked and received water from the woman of Samaria. In that prayer which King Solomon made at the Dedication of the Temple, we find this Petition, That God would vouchsafe to hear the prayers of the strangers; which they should offer up unto him in that house: whereunto Jeophib adds these words, For we are not so much as in-"wvative in nature, as to stand it affticted to strangers.

Ant. th. 9.

So peace I0 Oir.

Deut. 23. 6.

and Chr.

fometimes verbs, in intention of God wickedly, in God's place thereof, which was aggravated, in that being an Israelite, he had forfaken the God of his Fathers; and therefore was God provoked to blame all his enterprizes. For this alfo is to be observed, That the cafe of thofe, who being Israelites, forlook the Lord whom they knew, was far worse than of thofe that were strangers. For againft thofe that made this defection, the reft of the people might take Arms, and deftroyc them and all they had, Deut. 13. 13. Sometimes again when the Leagues are blamed, it is not for the Leagues fakc, but for the wicked intention of him that makes it: So God reproves A§a, for betaking himfelf to the Syrian, namely, out of diffidence; which he had declared by fending the Veffels confe-
monita quam legis praecipit, Wise mens counsel, than Dilectates of the Law: And these admonitions have many exceptions, as most Morals have.

But the Gospel gives a greater encouragement to Leagues made with such as are strangers in Religion, whereby they may in a just cause be relieved, than the Law doth; for as much as we are commanded to do good unto all men, yea, even unto our enemies; and this too, not as a thing commendable only, as to be thankful; but as a thing necessary: For we are enjoined thereunto, under this penalty of being reputed Balfards, and not Sons of our Heavenly Father, who in causing the Sun to shine, and the Rain to fall profitably upon the good and bad, would have all his Children, to do good unto all men. 'Twas very well said of Tertullian, As long as God restrained his Covenant to Israel only, he enjoined them to show mercy to their Brethren. But when he enlarged his Kingdom over all, giving unto Christ the utmost parts of the Earth for his possessions, he extends the Law of brotherly love unto all men, so that as he exempts no Nation from his Calling, so we should exempt none from our Charity. Which notwithstanding must be understood with some grains of allowance to those who are of the same Faith. So Clemens in his Conclusions, We are to communicate of our labours to all, but especially to the Saints. For as Aristotle observes, There is no reason that we should take as much care of strangers as we do of friends. Our eating and drinking with men of another Religion, is no where forbidden us; neither are we interdicted all manner of commerce with such as are Apostates from the true Religion, but only all familiar conversation with them, beyond what is necessary, but not such as may happily beget hopes of their Conversion. And by that of

2 Thess. 1. 15. St. Paul to the Corinthians, Be not unequally yoked with unbelievers, &c. It appertains unto those who communicated with them in their Idol Feasts, and were thereby drawn either to commit Idolatry, or at least to seem to do so. And this is evident by what follows, 2 Cor. 6. 14. What fellowship hath the Temple of God with Idols? like unto what he said before, Ye cannot partake of the Table of the Lord, and of the Table of Devils, 1 Cor. 10. 21. And yet we may not conclude, That because we may contract Leagues with them, therefore we may also willingly put our selves to live under the Government of Infidels, and contract Marriages with them: For in both these cases, there may be a great deal of danger and many hinderances to the free exercise of the true Religion. Besides, these bonds are more lasting: And a greater freedom of choice there is in our marriages, whereas Leagues are usually made, according to the occasions of time and place. And as to do good even to profane persons is not evil, so neither is it, to implore help from them: For St. Paul, we read, sought aid from the Tribune, and appealed unto Caesar.

In contracting Leagues with Infidels then, there is no Intrinick or Universal Evil, but what evil there is, must be collected from circumstances. For special care must be taken, that by our truer alliance with them, we do not scandalize the weak: And therefore where there is a mixture of men of divers Religion, as in an Army, it is very convenient, that their habitations be different, as the Jewish were from the Egyptians: whereunto also appertains what we have else where delivered concerning the Religion of Jews and Christians, when they jointly warred against the Pagans. And although by such Contracts, great improvement of profligate wealth may be made, yet were it better to abstain, unless it be upon great necessity. In which case, that of Thucydides takes place, They that are treacherously assaulted, as we are by the Athenians, are not to be envied, if they seek to preserve themselves by the aid, not of the Grecians only, but of the Barbarians. For, it is not the defence of every thing that is our right, that can justify us in the committing of that, which may, if not directed, yet indirectly prejudice our Religion. For we are taught in the first place, to seek the Kingdom of God, that is, the propagation of the Gospel: And it is seriously to be wished, that many Princes and people at this day, would be mindful of that free and devout admonition, which Full sometimes Arch-Bishop of Rheims gave to Charles the Simple; Whose heart doth not melt within him, to think that your Majesty should go about to contract friendship with God enemies, and to the ruin and subversion of Christians, to make use of the Arms of Pagans. Nihil enim disist, utrum quis Pagamini se socium, an inane Deo. Idolata colat; For, faith he, there is but small difference between confederating with Pagans, and by denying God, to worship Idols. Alexander in Armian, thought those men unworthy of the name of Grecians, who being so, did notwithstanding fight for the Barbarians against the Grecians, for that which did by right belong to Greece. Much more worthy of Imitation, was the Piety of Euanemius Duke of Savoy, who when he might have recovered Cyprus by the help of the Turks, refused it. I would to God, that all Christian Princes would follow the Example of this Genorous Duke, and not implore the Aid of Pagans against their Brethren, nor afflict them to enlarge their Empires, and consequently to darken the Light of the Gospel.

Hereunto I shall add, That since all Christians are but Members of one Body, which are commanded to have a fellow-feeling of each others sufferings; as that Command extends to every circuliar person, so should it to every Nation as they are a Nation, and all
Kings as they are Kings, should sympathize with their Neighbour Nations, and Kings that are apprized. Neither is every person more bound to defend his own members, than Princes are (by obedience to Christ) to defend each other with that power which he hath given them. But this duty neither Kings nor People can well perform, whilst Christian dom is invaded by the Enemies of Christ, unless they do mutually assist each other; which can never be done successfully, unless they strongly confederate together for that end. And such a General League between Chriftian Princes hath heretofore been made, whereof the Roman Emperor was by general consent chosen General, whereby all Christians were obliged to contribute either Men or Money, according to their power, as to the defence of Religion, which is or ought to be the common caufe: for the neglect whereof, I cannot see how any people can possibly excuse, unless it be such as are engaged in an inevitable War, or allied with some other general calamity at home.

Another Question doth often arise, namely, in cafe two Nations be engaged in War one against the other, and both are our Confederates, whether of them we are bound to help? Where in the first place, we must remember what we have already said, that ad bella injusta nulla est obligatio No League can bind us to a War that is unjust. If, therefore, we are not to be preferred, that hath the juster caufe, if the War be against a stranger Prince, we, if it be against another Confederation. The words of him that speaks Fealty to another, are these, Si ferovos velle tu aliquem justi offendere, & inde generaliter, et speculter fuos requiratis, menum tibi sicut potere, praelabo auxilium. If I shall understand, that thou wilt make an offensive War against any man upon a just ground, and that I am either generally or specially required to give thee mine assistance, I shall do it to my utmost power. Thus Demosthenes in his Oration concerning Megalopolis, The Athenians are bound by their League to aid the Missionaries their Confederates, against the Lacedemonians their Confederates, if the Lacedemonians were the first Aggressers: which holds true, unless in our Articles it be expressly forbidden, to send out any aid against such a Confederation. In that Agreement which Hannibal made with the Macedonians, there is this Clause, Hostes criminis hostium, exceptis Regibus, Civiatis, &c. Quibuscumque sardis nobis & amicibus est; Enemies we shall be to thine Enemies, except only such as are in League and Amity with us. If two Nations be at War, and both our Confederates, and neither of them have a just cause (which may so happen) we are to stand Neuters, and to assist neither. So Article, If either of our Confederates required our aid against strangers, it had been readily granted; but if against one another, we desire to stand Neuters. If both our Confederates be engaged in a just War against strangers, and both send for Aid; if we are able, we must send to both either Men or Money: But if a Prince shall be required by both to aid them in his own person, having so promised; they because his person cannot be divided, it is but reasonable that he should prefer him, with whom he hath contracted the amentioned League: As the Epom answered the Lacedemonians in Polybius: The like answer was given to the Companions by the Roman Consuls. In contracting friends, it is fit that we take care, that the new do not supplant the old: The Ancients the Leagues are, the more insolvable. Thus Pelon answers the Athenians in this like case, Amici servanda Auxilia contra hostes, non contra amicos: We are to aid our Friends against Enemies, but not against our Friends. Which also will admit of this exception, unless the latter League do bind us further than our bare promise; for it may include a tranflation of the Government, and imply somewhat of subjuction. And thus we say, that in selling of Goods, the first sale is the best, unless the latter shall also transfer the property and dominion. So Livy of the Nepos, That the faith given upon their surrender, bound them faster, than that given by former Leagues as to their Associates. Some there are that do more nicely diftinguish between these: But what have said, I take to draw nearer to simplicity, to also to truth.

A League for a certain time preftent, is not easily preftuned to be renewed through fience, unless such acts intervene, which cannot otherwise be understood; for a new oblication is not easily to be preftuned. If either party violate the League, the other party is freed: because each Article of the League, hath the force and vertue of a Condition. Thus Thucydides determines it; They, (faith he) are not the first breakers of the League, who being deferted, seek for aid to others; but they that perform not by their deeds, what they have promised to do upon their Oaths. And in another place, Sici vel tantum in ex diffis, pars altera vtrque tranferetreur, ruptra fuint pacta; If either party shall transfere the Articles they have sworn unto, never so little, the League is broken. This also is true, unless it be otherwise provided by the League, as it usually is, left what is seriously debated and solemnly sworn, should be adjudged to be broken upon every rash offence.

Spondions are such promis or undertakings, as Generals make without the content of their Sovereign; for the performance whereof they engage themselves, or give hostages till it be confirmed by their Prince or Senate. The Subject matters whereof are as diverfe,
diverse, as of Leagues. They differ from Leagues, in the dignity of those that make them. Concerning those Engagements, two Doubts usually arise: The first is, whether, if the matter engaged for, be refused by the King or State, how far forth are the parties engaged, bound? Whether to make up what the King or State shall not think fit to grant, or to restore all things to the same state and condition as they were in before such agreement was made, or to deliver up their own bodies and the hollages to the Will of the Enemy. The first whereof is most agreeable to the civil Law of the Romans: The second to Equity and Reason; which we found urged by the Tribunes of the people in the 

Causes Controversie: The third is most approved of by Ufes and Custom, as appears by the examples of the two notable Sponfions made at 

Caudo and Numantia. 

The Sponfions made at 

Caudo and Numantia.

The two 

Confuls, the two Quef tors, 

four Praetors, 

twelve Tribunes, 

all which were delivered up, upon the Caudo 

Engagement, but upon the 

Numantia, the 

Confus only: the reft were spared for 

The Gracchi 

his fate: as Plutarch in the Life of 

Tiberius Gracchus 

records. 

With us the 

Sponfors 

Elaters to 

satisfie the 

damage, and 

their perfon 

to be made 

Slaves. 

Vit. Max. lib. 

lib. 3.

VII.

Whether the 

Articles of 

agreement 

being made 

known to the 

Prince, do 

bind him in 

case of 

silence.

Of Leagues and Sponfions. 

BOOK II.

There is yet another Question to be resolved, namely, Whether after notice given to the Superem Power, of an agreement so made, silence may suffice to prove a content. And here we are in the first place to distinguish, whether the Sponfion were purely and simply made, or whether it were upon condition, that it be ratified by the Superem Power; for if it were conditional, that condition being fulfilled, the Sponfion is of no force, like as that of 

Lutobin, which he made with the Carthaginians, which the people of Rome denied to have been made by their Authority: And therefore another Leage was by common consent agreed upon. In the next place, requisite it is to know, whether any thing were by the Decree of the people acted, which might probably argue their accep-
ceptance of the agreement so made. For silence of it self, is not sufficient to prove a consent, without some other thing or deed which in all probability would not have been, had not that engagement been approved of, as hath been already declared when we treated of the relinquishing of our propriety. But if any such thing or deed happen, which cannot probably be referred to any other cause, then it may justly argue a Consent and Confirmation, as Cicero well observes in the case of the Gadicans. The Romans orat. prol., pleaded Silence against the Carthaginians, when they underlood the Agreement made by Aderbal; but because that agreement was made in Negative terms, namely, That no Carthaginian should pass the River Iber, it would hardly be admitted, that a bare silence should be sufficient to ratife the fact of another; because no Act properly theirs, could suffice to prove the ratification of that agreement, until some Carthaginian did attempt to pass the said River; but being prohibited by the Romans, the Carthaginians did obey the Order. For such an act, hath the force of a positive act, and is not to be ranked among those which are barely Abnitive. Now, if that Accord made by Lucrinus, had consisted of many parts; and if it had constantly appeared, that the Romans had observed the rest of the parts which did abridge them of their Common Right, this had been sufficient to justifie, that that Agreement in all probability was firmly ratified. It remained now that we should speak of such agreements as Captains and Soldiers make among themselves, not concerning those things which belong to the Supream Power, but to their own private concerns, and which are permitted unto them to do one to another: But we shall have a fitter opportunity to treat hereof, when we come to speak of such accidents as usually happen in War.

CHAP.
Concerning the True meaning, and Interpretation of Leagues and Promises.

I. How Promises do outwardly bind.

II. The words to be understood, as vulgarly taken, unless strong Conjectures lead us otherwise.

III. Words of Art, according to Art.

IV. Conjectures useful, where the words are either ambiguous, or seem to be repugnant, or offer themselves freely: at.

V. From the Subject matter of the Promise.

VI. From the effect.

VII. Whereunto appertains that conjecture, that is drawn from the reason moving, and when and how that takes place.

IX. Of the large and strict signification of words.

X. The distinction of Promises, into favorable, burdensome, and mixt or middle.

XI. Concerning the acts of Kings, or people; the difference of those Contracts, which oblige in equity, and of those that oblige in strictness of Law, rejected.

XII. Out of these distinctions, some rules are formed that will guide us in our interpretation of Promises and Contracts.

XIII. Whether under the name of Associates, those in present or those also in future, be comprehended, and how far.

XIV. How these words are to be understood, that one party shall not make War without the approbation of the other.

XV. Concerning these words, that Carthage shall be free.

XVI. What Contracts are to be accounted personal, and what real, explained by distinction.

XVII. A League made with a King is in force, though that King be expelled his Kingdom.

XVIII. But not, as to him that usurpeth the Kingdom.

XIX. A Promise made to him that shall first do a thing, if that thing be done by many at once, to whom is it due.

XX. A Conjecture freely offering it self, may either be extended, and in what case;

XXI. Concerning the fulfilling of a command not directly in kind, but in another kind, as good, or better.

XXII. Or Contrasted; and that either from some Original defect in the Will, which also may be collected, either from the absurdity that will ensue;

XXIII. Or when that which was the sole cause exciting the will shall cease;

XXIV. Or from the defect of the matter:

XXV. (Observations upon the aforesaid conjectures.)

XXVI. Or from the repugnancy of some emergent case with the Will, which may be collected, either as being unlawful;

XXVII. Or when by reason of that all some great damage or charge ariseth to him that promiseth;

XXVIII. Or by some other signs, as when the parts of the writing do clash one against the other.

XXIX. By what rules then we are to sever our conjectures.

XXX. That in a dubious case, a writing it not necessary to perfect a Contract.

XXXI. That the Contracts of Kings are not to be interpreted by the Roman Laws.

XXXII. Whose words are most to be observed, his that offers a condition, or his that accepts of it, explained by a distinction.

If we respect the person alone that promiseth, he is obliged to perform that freely, whereto he was willing to be bound. What Cicero faith in this case is true: In fide quid senefit, non quid dixeris cogitandum; In things depending upon faith, what thou meanest is more to be considered, than what thou saiest. But because our inward thoughts are not determinable, and that there would be no obligation at all by Promises, were every man left at liberty, to frame what interpretation he pleased of them, therefore some certain Rule must be agreed upon; whereby we may know to what our Promises do bind us, and purely natural reason will inform us, That he to whom any thing is promised, hath a power to enforce the Promiser to that which his Promise rightly interpreted, doth suggest. For otherwise, no treaty would have an end, which in things appertaining to Morality is held impossible. And perhaps in this it was that Isocrates treating of agreements in his prelection against Calumachus faith, We men do all of us, whether Greeks or Barbarians, dispatch affairs, using this common rule: hence it was that in ancient Leagues, this form was usual, faith Livy. Without any evil fraud, according to the usual sense and true meaning of the words here at this time. Thus do the Hebrew Doctors
Doctors upon the 50. of Numbers interpret Words in that sense, as the words are commonly then understood. The bell rule of interpretation is that which guileth at the will, by the most probable signs. Now these signs are of two sorts, as words and other conceptions: and these considered sometimes a part, and sometimes conjoined.

If there be no conjecture that guides us otherwise, the words are to be understood according to their propriety; not that which is Grammatical or Primitively, but that which is vulgar and molten in use.

Quem pene arteritium est & jus & norma legundis;
Which gives at pleasure, Rules and Laws to speech.

It was very well said by Procopius, Long time doth not alway preserve Words in the same signification as they were at first given. For the very things themselves are turned in sense according to men's pleasure, without regard to those names that were originally imposed on them. It was but a simple refuge that the Lexivans made use of against Perjury, when having put some of their enemies earth into their Shoes, and carrying some heads of Garlick covertly on their shoulders they wade, they would keep the Articles of the League (which were very grievous) so long as they carried those heads on their Shoulders, and trod upon that earth: But having cast away the earth out of their shoes, and thrown away those heads of Garlick from their Shoulders, they thought themselves absolved from their Oaths; which Scourge we find in Polybius: not much unlike is that of the Batavians in Tacit. Histories, Who having promised to refor a certain City, thought it sufficient to preferve their faith, if they refrained it not standing, but demolished. So Suet. Mahomet, having taken Ecbatana, cut the Governors body athunder, whose head he had promised to preferve. But (as Cicero well observes) this is not a way to prevent Perjury, but to confirm it.

If in a League, there be an occasion to make use of Terms of Art, which the people understand nor, those terms are to be defined and explained by the most skillfull in that Art, as what Majesty is, what Parricide, &c. Wherewith Rhetoricians use to limit the matter treated of. For what Cicero faith is very true, That the terms of Logic are not vulgar, but proper to themselves only, as indeed are the terms of every Art. As when the word Army is used, it is to be understood of such a number of Soldiers, as dare openly invade another Dominions. For Historians do distinguish between those words that make spoil of another Territories, secretly and like Robbers, and those that do it openly, with a just Army. Now the bell way to judge what numbers make an Army, is by the strength of him against whom it is sent out. In Cicero's account Six Legions with Auxiliaries was an Army. Polybius was of opinion, that One hundred and sixty thousand Romans, and Twenty thousand of their Allies, made a compleat Army; but a leffer number may also sometimes do it. Opian gives him the title of General that had the charge of a Roman Legion, with some Auxiliaries: Which as Vegetius expounds it, consisted of Ten thousand Foot and Two thousand Horfe. Legy seems to contract an Army to Eight thousand. The like may be laid of a Fleet, which a certain number of men of War make up sometimes more, sometimes less. A Fort is a place so fortified that it may hold out against an Army for a time, Airs from arco to repel or drive away, because by forts the enemy is restrained and driven back.

Conjectures are useful when words or sentences will admit of diverse senses, which Rhetoricians term Ambibilogies; but Logicians do more subtly distinguish, for if one word will admit of diverse significations, they call it an Hemonomy; if a sentence will admit of a double sense, they term it an Ambibleby. So likewise when in any Contracts, there appears any seeming repugnancy. Then must we fly to conjectures; as also where its several parts seem to clash one against the other, we must by guessing at the sense, reconcile them if possibly we can; but if not, then shall that be admitted which pleased the Contracters last: Because it is not possible that at one and the same time, the will should imbrace two contraries, and in things that depend upon the will, the latter act derogates from the former, whether it be the act of one Party only, as in a Law, or a Testament; or of more, as in Contractors agreements; in which cases, the evident obscurity of the words and sentences do justify our conjectures. Sometimes again the conjectures themselves are so plain and evident, that they carry us to a sense contrary to those of the words. The common heads whence these conjectures arise are chiefly, either from the matter, or from the effect, or from other things conjoined.

First from the matter: as the word Day (if a true be made for Thirty days) ought to be understood of natural days, but not of Civil, being most agreeable to the subject matter. So the word dura (i.e.) to be taken freely is taken to tranact according to

II. According to the sense of the words, if other conjectures do not hinder.

III. Words of Art according to Art. Reform ad substantiatum.

IV. Interpretation by conjectures.

V. From the Act.
to the quality of the affairs. The word, Arms, sometimes signifying instruments of War, and sometimes armed Souldiers, is to be understand in such a fence, as is most congruous to the matter whereunto it is conjointed. So when men are promised to be delivered, it is to be understand of living men, not of dead, contrary to the Cvil of the Plateaus. So where Souldiers are required to lay down their Iron or Steel, it is enough if they lay down their weapons, and not their Steel Buttons, as Pericles would have it. And by a free departure out of a City, is meant a safe conduct to the place agreed on, contrary to that fact of Alexander. And by leaving half a Fleet, is meant the one half of the number of Ships whole, not dillected, contrary to what the Romans dealt with Antiochus. The same judgement may pass upon the like cases.

Then from the effect, the chiefest whereof is this, If the word taken in the most usual fence do infer an effect contrary to reason; then may we fly to conjectures. For where the word is ambiguous we must take it in such a fence, as will admit of no incongruity. It was therefore but a foolish Cvil of Brifedais, who having promised to depart with his Army out of the fields of the Bactrians, denied afterwards that the place where his Camp was pitched, belonged to the Bactrians as if that promise had been made, in reference to the possession which the present fortune of the War had given him, and not to the ancient bounds of the Bactrians; in which sense the agreement had been void.

Lastly, from other things conjointed; and those either such as sprang from the same root (i.e.) from the same evil, though haply in some other place, or upon other occasion declared, whereupon we ground our conjectures. For it is to be presumed that in a case that is dubious, the will doth constantly adhere to one fence. As in Homer where it is said it was agreed between Menelaeus and Paris that Helen should be his that should be the Victor; it was afterwards judged who should be the Victor, namely he that killed the other. For, faith Plutarch, Judges are guided by that which is plain, and not by that which is obscure. It was an excellent observation of Augustine concerning some Heretics, That they could out some sentences of Scripture, whereby they deluded the simple by not observing the Coherence of it, to that which went before, and that which followed after, whereby the meaning of the Writer was to have been discovered.

Or of such things as are also conjointed in the same place, amongst which the most forceable is the reason of a Law, which some confound with the mind of the Law, whereas it is but one of those signs, whereby we guess at the mind of the Law. So Cicero in his Oration for Cecina, Whether I am thrown out of my possession by your lawful Attorney in your absence, or by your Tenant, Farmer, or Servant, who forceth me out in your name, and by your command, it makes a difference; for reason of the Law holds in any of these cases. Now of all conjectures this is the strongest, when it evidently appears, That the Will was excited to such a thing, by some one reason, as its solitary cause, for oftentimes there may be many considerations moving us to do a thing; And sometimes besides reason, the Will to shew its freedom determines it itself, and this alone is sufficient to beget an Obligation. Thus things given in reference to a Marriage, alter not their property, in case the Marriage succeed not.

Moreover, many words will admit of divers significations, as being taken sometime strictly, sometimes largely; which proceed from many reasons, either because the name of the Genus doth adhere to one of the species, as in the words of Cognition and Adoption; and in words of the Masculine gender, which are taken for the Common, where the Common is wanting; or because words of Art are more extensive, than those that are vulgar: As Death in the Civil extends to banishment, but in the vulgar acceptance implies only a separation of the soul from the body.

It is also to be observed, That of those things that are promis'd in any League, some are friendly and favourable, as those that are on both parts equal, and to both profitable, which the farther it extends, the greater is the favour in the Promise; as in those that belong to Peace, the favour is greater than in those that belong to War; and in War, those that respect defence are more favourably to be interpreted, than those that are made for other causes. Some are also discoursed on, as those that are imposed on one Party only, or which are more burdensome to one Party than to the other; and those that are imposed by way of punishment, or which make some acts void, or alter what hath been agreed on formerly. But in case any are mixt, as those which do alter somewhat formerly agreed for the settling of Peace, that according to the greatness of the good, or of the alteration shall be judged either favourable or odious; yet so as if other things are equal, those made in favour shall be preferred before others.

The difference of acts due in equity and those due in strictness of Law, if we mean only the Roman Law, appertains not to the Law of Nations: Yet may it in some fence be better applied, as namely, If in any Regions there be some acts which have one certain
common form, that form so far forth, as it is not changed may be understood to be in the very act. But in other acts, by themselves, indefinite, such as are a free Donative, or a free Promise, we should more adhere to the very words.

These distinctions being thus observed, we are to guide our conjectures by these rules, in things not odious, the words to be understood in their full propriety as they are vulgarly taken; and in case there be any ambiguity in them, then are they to be taken in the largest sense: As when the Masculine only is express, both sexes are to be understood; and where things are mentioned indifferently, they shall be understood universally. So these words unde quin dejellus eft; From whence one is through out, shall be understood so as to imply the referring him to the possession of that which hath been forcibly detained from him: For the words in their largest signification will admit of this construction, as Cicero pleads in his Oration against Catilina. But in such as are yet more favourable, if he that promiseth anything be veris in the Law, or uie the advice of Lawyers, the words shall then be yet more largely understood, so as to include the signification of Art, or that sense which the Law hath given it. But to have recourse to such interpretations as are plainly improper, we ought not, unless it be where some absurdity would otherwise ensue, or where something would render the Agreement impracticable. On the contrary, if neceflily shall so require, to avoid either some manifest injustice, or some evident absurdity, we may not interpret the words more strictly than their Propriety will bear. And though there be no such necessity, yet if there appear either manifest equity, or very great utility in the restitution, we are to confine our selves within the strictest bounds of Propriety, unless other circumstances forbid it. But in such as are odious, that the burden may be moderated, even Figurative Speeches are sometimes admitted: And therefore in voluntary grants, and in the remission of that which is a Man Right, though the words be general, yet are they to be restranied unto those things, to which in probability they were intended. And amongst things of this kind, that is sometimes understood to be poftlefs, which we have hopes may be recovered. So lachors promissed by one party only, are presumed to be rafed at the charge of that party that requires them.

But here a notable Question is sometimes started, Whether by Friends mentioned in a League, we are to understand those only that are so at the League making, or those also which shall afterwards be admitted. In that League made between the Romans and the Carthaginians after the Sicilian War, it was Covenanted thus, Omnique populi socius antiquo populo tute fumus; That the Friends of either party should not be molested by either party. Hence the Romans would infer, That though the League made with Africam, of not pafing the River Heraus, did nothing avail them, because the Carthaginians refused to sign it; yet in cafe the Carthaginians should own that fact of Hamilcar's in besieging the Saguntines, who had been admitted into League with the Romans, though after the said League with the Carthaginians, they might justly denounce War against them, as having first broken the League. Livy thought the Saguntines well enough provided for, in that the Allies on either side were excepted. For neither was this clause added, That those that were at that time Friends, nor were they excluded that should afterwards be admitted (Which was added in the Peloponnesian League, between the Lacedemonians and the Athenians). And seeing that it was lawful for them to admit of new Confederates, who could conclude it reasonable, either that no Nation should be received upon any merit whatsoever; or that being admitted the same should not accordingly be defended. Provided always, That none of the Allies of the Carthaginians should be either solicited to revolt, or received into Pretension, in case they voluntarily did so. Which are the very words almost of Polybius, and from him by Livy borrowed. There is no question at all, but that the words of the League might admit of either, (i.e.) either to refrain them to those therein League only, or to enlarge to those whom hereafter be received, and that without any incoherence of speech. But the best interpretation may easily be gueld by the precedent rules: According to which we say, That they who were to be admitted were not comprehended; for the matter in Treatise now is of the breaking of a League, which is Rex odiojus A thing in itself odious. And Secondly, It concerns the abridging of the Carthaginians of their liberty, in taking a just revenge upon those who had injured them) which by the Law of Nature was their due, and fo not rashly to be understood as given away. What then shall we hence conclude, That the Romans might not admit of the Saguntines as their Friends; or being so admitted, might not defend them? Yea, certainly they might, but not by virtue of the League, but by the Law of Nature, that which League had not abrogated: So that the Saguntines were at that time both to the Romans and to the Carthaginians in such a state, as if in that League there had been no mention at all made of Friends: In which case, both the Carthaginians might revenge the injuries done them, and the Romans might also justify defend them, without breaking their League one with the other. Thus the Romans answered the Summites, who defining that they might have liberty to

XII.

By these rules we may frame Interpretations of words and promises. See Sec. 5. & 20. §. 11.
Of the Interpretation of Leagues and Promises.  

BOOK II.

make War upon the Sidicines without offence to them, That they knew nothing to the contrary, but that the Samnites had power to make Peace or War upon whom they pleased. And in the League made with Antiochus, It was provided, That if any of the Allies of the Romans should make War against Antiochus, it might be lawful for him by force to repel them: So as he held not any of their Cities from them by the Right of War nor contrary to any Alliance with them. In the time of King Pyrrhus it was thus covenanted in a League between the Romans and the Carthaginians, That in case either of the two Cities should make Peace with Pyrrhus, it should have with a Reservation of Liberty to lend succours unto that City against which Pyrrhus should at any time make War. I do not say that the War on both sides in these cases could be just: But I deny that if either party did send succours unto the other, they did therein violate the League made between them: As Polybius rightly distinguishing concerning the succour sent to the Marmetines, Whether it were just, and whether it were lawful so to do, without violating the League. Thus doth Alexander, King of the Saracens, plead for himself, That none of the Articles of the Agreement made between the Romans and the Persians had been by him violated, forasmuch as he was not so much as named in them by either party. Thus also did the Carthagians tell the Athenians, That notwithstanding their League made with the Lacedemonians, they might send them succours, because it was in their own power notwithstanding that League, to admit of any new Friends at their own pleasure. And the Athenians did afterwards assume this Liberty, commanding their Generals not to make War against the Corinthians, unless they saw the Corinthians ready to invade the Carthagians in any of their Territories, lest they should seem to break their League with the Corinthians. For, it is no breach of a League, that they who are injured by others, should by others be defended, so long as the Peace in other things is preserved. And lo after these times the Carthagians decreed, That they would assist with their Arms the Athenians their Allies, according to their Covenants, and yet preserve the Rights of Friendship with the Lacedemonians. Justin writing of those very times, faith, That the Athenians broke that Truce in the name of their Allies the Carthagians, which they made in their own name with the Corinthians, thinking it a better Policy to help their Friends being invaded, than to engage against the Corinthians in a Solemn War. So the Athenians making a Peace with King Philip, did expressly provide that those Greek Cities that were not comprehended in that Peace might remain free: And if any man did molest them, it might be lawful for those that were included in that Peace to defend them. And let this example suffice for equal Leagues.

In such Leagues as are unequal we shall give another: If it be agreed that one of the Confederates shall not make War without the others Consent; as it was in that between the Romans and the Carthaginians after the second Punic War; and as it was also in the League between the Romans and the Macedonians, before the reign of King Perseus: Since under the notion of making War, all Wars may be comprehended, as well that which is Defensive as that which is Offensive. The word is to be taken in its strictest signification, left the liberty of defending our selves, being Natural, should be too much threatened.

Of the same kind is that which the Romans promised, namely, That Carthage should be free; which though it could not reasonably be underfoot of Absolute Power, from the very Act, for they had long before loft the Right of making War, and diverse other priviledges, yet was it to be presumed, That some kind of Liberty should be left them, and so much, at least, that they should not be obliged to translate the Seat of their dwelling into a Foreign Countrey, and to have their own City demolished. It was therefore a foul gloss which the Romans did afterwards put upon that Promise, when they urged, That by Carthage they meant the multitude of their Citizens, and not their City, (which, though improper, may be granted, because of that attribute, Free, which is more agreeable to their Citizens than to their Town.) For, in these words, Carthage shall be left free, was meant that it should be governed by its own Laws. And as Diodorus Siculus expounds it, That they should enjoy their own Laws and Territories, their own Religious Rites, their own Sepulchres, and their own Liberties. For so much was granted in leaving them free. So that what the Romans objected was a meer cauli, in making them free, yet taking their City from them.

Another Question likewise doth usually arise concerning Contracts real and personal. When we have to do with a free people, there is no question, but that the Contract that is made with them, is in its own nature real, because the Subject is a thing permanent. Yea, though that popular State should turn into a Monarch, yet would the League hold, because the body of the people is still the same, though the head be changed; neither doth the Supreme Power cease to be the power of the People, because exercised by the King: where we must except this case, namely, where it appears, that the caufe was proper to that State only, as when Free Cities enter into a Social League for defence of their own Liberties. But if a League be contracted with a King...
King, it is not infallibly to be accounted Personal: Because, as Ulpian well observes, for the most part the person is inferred in the League: Not that the League is personal, but that it may appear by whom that League was made. But if it be inferred in the League, That it should stand for ever; or that it is made for the general good of the kingdom; or that it is made with him and his Successors: (For this addition est inferius is usual, faith Libanius in his defence of Demosthenes:) Or to continue for such a limited time, (as mostly some of these are inferred:) It will from hence sufficiently appear that the League is real. Such was the League made between the Romans, and Philip King of Macedon, which when his Son Perseus denied to bind him, was the cause of the War ensuing. There are also other words that may serve to prove a League to be real, yea, and sometimes the matter itself may administer ground for probable conjectures. And where the conjectures are equally probable, there we may conclude, That those Leagues which are favourable and equal, shall be accounted real, those that are grievous and hateful, Personal: Leagues made for the preservation of mutual Peace or Commerce are favourable; those that are made for War are not always odious, as some hold; but if they are made for mutual defence, they draw near to such as are favourable: But those that are for a Social War do too nearly approach to those that are burthensome. Besides, in those that are made for any War, great respect is to be had to the Prudence and Justice of those with whom we contract: That they be such as will not engage us in a War, either unjustly, or too rashly, when it may be avoided. And as to that saying, That Societies are dissolved by Deaths, I alledge it not here; for this appertaineth Private Societies, and is determinable by the Civil Law: And therefore whether the Fidenates, Latines, Etruscans, and Sabines, did right or wrong in departing from their League upon the death of Romulus, Titius Ancus, Priscus, and Servius cannot rightly be determined by us, because the words of the League itself are not extant. The Queen of Scots being deposed by the Estates of the Realm, and imprisoned in England, and her Son an Infant solemnly Crowned: The French refused to own any but the deposed Queen, saying, That the ancient League between her and the French King was to be observed. Whereunto the English replied, That she being deposed, and her young Son inaugurate, the French King ought by that League to defend him; for that ancient League was not contracted between the persons, but between the Kingdoms of France and Scotland: Which was plain by the very words of that League, wherein it was provided, That if the Crown of Scotland should be at any time controverted, the French King should defend him to whom the Estates of Scotland should adjudge it. Whereunto not much different is that controversy in Justin, Whether the Cities of the Medes, which had been Tributary, did change their condition with the change of their Empire. For it is to be considered, Whether in that Convention they had committed themselves to the protection of the Medes. And here we must note, that Bodine’s Argument is by no means to be admitted, That the Leagues of Princes bind not their Successors, because the obligatory power of an Oath dyes with him that takes it. For an Oath sometimes binds the person only, and yet may the Promise made and confirmed by that Oath, bind the Heir. Neither is it altogether true, that all Leagues are grounded upon Oaths; for usually there is power enough in the very Promise to bind, though for the more reverence, those Promises are confirmed by Oaths. Publius Valerius being Consul, the people of Rome bound themselves by Oath to assemble at the Summons of the Consul; he dying, and Lucius Quintus Cincinnatus succeeding him, the Tribunes of the people began to cavil, alleging that Valerius being dead, the people were freed from that Oath. Whereupon Livy gives his Judgement thus, That general contempt of the Gods that now reigned, had not then corrupted that age: Neither were men then so audacious, as to give unto their Oaths what Interpretation they pleased, and thereunto to adapt their Laws: But they chose rather to compose their manners unto that, whereunto they had so religiously sworn.

Surely a League made with a King is valid, though that King or his Successor be expelled his Kingdom by his own Subjects. For though he hath lost his possession, yet he doubles the Right and Title to the Kingdom remains in him, according to that of Lucian concerning the Roman Senate:

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Non quum perdidit Ordo
Mutata fuit iura loco

Though the Imperial Sear be changed quite,
Yet must the Empire still retain its right.

But on the other side in case a War be made against him that usurps the Kingdom, with the consent of the true King, or if it be made against him that oppreareth a free people, before he hath been established by their general and free consent, it shall not be
be interpreted as a breach of any former league: Because these men, though they have got possession, yet they have no Right to what they hold. And therefore the Emperor Johnian, yet he had broken the League made between him and Gislerich, by making War against Gellmer, who had at once deprived the lawful King Hildericus both of his Liberty and his Kingdom. Thus doth Titius Quintius also plead against Nabis, on the behalf of the Roman, We made no League or Confederacy with thee, but with Pelops, the just and lawful King of Sparta. Now in Leagues, these qualities of a King, a Successor, and the like, are favourably to be interpreted, as being properly their Right, whereas the cause of an Ulterer is odious.

Another Question we find handled of old by Chrysippus, namely, Whether a Reward promised to him that shall first arrive at such a place, is to be given to both, if both arrive together, or else to neither. Where we must obverse, that the word First is ambiguous: For either it signifies one that precedes all the rest, or one before whom, none. But because the Rewards due to vertue are to be confirmed with favour, both of them that shall arrive together, shall share the Reward between them: Although the Librality of Scipio, Cesar, Tullian, and others, was more honourable, who to each of them that first scaled the Walls, if more than one did it together, gave the entire Re- ward promised. And let these suffice to be laid concerning the proper and improper signification of words.

There is also another way of interpreting by conjectures beyond the signification of the words wherein the Promise is contained: And this also is two-fold, either by extending them farther than the words signify, or by retracting them. But that interpretation which restrains the signification of words is safe, but that which enlargeth, them more difficult. For as in all humane things, the want of any one cause is enough to make all the rest ineffectual: But to produce an effect, all the causes must concur; fo also in this case of obligation, that conjecture that shall extend the Obligation is not rashly to be admitted: But with much more caution than in the case before mentioned, where we admit of words in their largest signification, though not much in use. For here we raise our conjectures without regard had to the words promising, which cannot introduce an obligation, unless the Conjectures be very certain; for here a party of Reason is not sufficient, unless it be the very name: Neither is the name Reason at all times sufficient; because, as I said before, Reason doth often so move us, that to shew our own freedom, our will is of it self a sufficient cause of our Promises, without any other Reason. Now to justify such an extended conjecture beyond the words of the Promise, it is necessary that it should plainly appear, That the Reason under which that café which we would comprehend falls, was the only and most efficacious cause which moved the Promiser; and that that Reason was in its generality so considered by him, because otherwise the Promise would prove either unjust or unprofitable. As for Example, An agreement that such a place should not be surrounded with walls, being made at such a time when no other Fortifications were in use, should doubtless extend to all Muniments, though but of Earth, in case it do appear, that the only reason why Walls were prohibited, was, That that place should not be fortified. Another Example is usually brought of a man, who believing his Wife to be with Child, dispofeth his Eftate to fuch a man in cafe that Child should dye, which by all probable conjectures should be extended to this fene, Or if such a Child should not be born: For certain it is, That the Will of the Testator was moved by this only consideration, That then he should have no Child of his own to inherit it: This cafe we shall find, not among the Lawyers only, but in Cicero, and in Valerius Maxima. Cicero in his Oration for Caecina, pleads this cafe thus, What? Is this sufficiently provided for in words? No. What then was of force to do it? The Will: Which if it could be understood by silence, we should have no need of Words: But because that cannot be, therefore were words invented, but such as should not hinder the Will, but declare it. And a little after, in the fame Oration, he adds, Item jus esse, uti perpectur una atque edam confa aquatica, Where there manifeftly appeared but one and the same cause of Equity, (i.e.) where there was the fame solitary caufe moving, It may be presumed there is afo one and the same Right. Thus Philo in his Special Laws proves that it is Adultery to lye with a woman that is betrothed to another, and he adds this reafon, Quia idem valent spontanea quad Nuptia; Because, faith he, such Efpoufals are equal to Marriages. (So likewife in the Mediusial Law, under the name of Oxen, are all gentle Beasts comprehended; so is every Pool or Pond under the name of a Well:) So like- wise an Injunction, though it run in this form, Ut de me aves dejecturis hominibus caulis, armatis; Whence thou haft thrust me out by force and arms, takes place also against all manner of force that threatens our life and limbs. For that which is usually done by armed men, if by any other counsels or means we are brought into the fame danger, the Law affords as the fame Right and Remedy. Quintilian the Father, in one of his Declarations brings in this Example, Martial doth usually signify the effusion of humane blood by the Sword: But if a man be killed by any
Conjectural Interpretations.

any other means we have recourse to the same Law: For if a man shall fall among Thieves, or if he be thrown into a River, and there drowned, or if he be tumbled headlong from an high Precipice, his death shall be revenged by the same Law as if he had been killed by the Sword. The like Argument we find used by Isaeus, concerning the Inheritance of Pyxibus, where because of the Laws of Athens, a Father having no Son could not make his Testament if his Daughter were unwilling; he infers, that neither had he, without her consent, the power of adopting one.

And from hence that famous Question in Gellius may easily be answered, concerning a Command given by our Superior, Whether it may be fulfilled, though not by the same, yet by another thing equally profitable, or haply more than that which was commanded. Servants, faith Quintillian, oft times more freely of a good mind; and even our Slaves bought with our Money, do sometimes think, it an Argument of their Fidelity to do otherwise than they are commanded. Which may be done, if it appear, That what was so particularly described, but only under some general consideration, which might also be otherwise obtained: But if that do not sufficiently appear, then we are to follow Gellius his advice in that place, For the Authority of a General would quickly be constrained, if what he commands should be disputed, and not obeyed.

That Interpretation that restrains the fence from what the signification of the words, wherein the Promife is contained, will bear, is derived either from an originary defect of the Will, or from the repugnancy of some emergent cafe with the Will. The originary defect of the Will is understood, either from some absurdity which would otherwise evidently ensue, or from failing of the main Reason which alone did fully and effectually move the Will; or from a defect of matter. The first whereof is grounded upon this, That no man is to be believed to will things that are absurd.

The Second is grounded on this, That what is contained in the Promifhe whereunto such a Reason is added, or where it is plainly underflood, is not considered barely or simply, but as it falls under that Reason.

The Third is grounded on this, That the matter so restrained is always observed to be in the mind of him that promifeth, although the words of the Promifer do admit of a large signification. But as concerning the Reason that moves the Will we must observe, That under it are comprehended not only things actually existing, but sometimes things that morally considered, may be; which when it takes place, no restriction ought to be admitted. As when it is in any League provided, That no Army or Fleet shall be sent to such a place, they ought not to be led thither, though there be no intention thereby to do harm, because in that agreement not so much the present danger, as all future dangers whatsoever are regarded. But here it is also sometimes questioned, Whether Promises are to be understood with this tacit condition, That things remain so as they were when the Promife was made; Which we deny, unless it do manifestly appear, That that present condition of things was included in that only Reason which we have said. And we read of nothing more frequently in Histories than of Ambassadors, who understanding so great an alteration made in the State, as would render the whole matter and cause of the Embassie fruitful, have returned home without attempting any thing.

The Repugnancy of some emergent cafe with the Will is of two forts: For the Will is guessed at, either by Natural Reason, or by some other sign of the Will. The proper office to judge at the Will by Right Reason, Arifotle alligns to Prudence in the understanding, and in the Will, to Equity, which he very fitle defines to be the Correction or Mode-ration of that wherein the Law by Reason of its generality is deficient: Which ought to take place, as well in Testaments as in Contracts respectively. For seeing that all emergent cafes could neither be foreseen by the Law-giver, nor excepted in the Law; therefore there is a neceffity that some liberty should be granted for the exempting of such cafes, as he that made the Law would have exempted, had he been present, or could he have foreseen it: And yet is not this raifily to be admitted, for that to make himself Lord over another mans act; but then only, when we have sufficient signs to justify our Conjeftures. Whereof none can be more juft than this, when they would bind us to things repugnant to the Laws either of God or Nature. For such Laws having no power to oblige, are necelfarily to be exempted. Qua dam etiam nulli significatione Legis comprehendens funt, natura tamens excipium; There are some things ( faith Quintillian) that naturally are excepted, although they are not comprehended by any signification of the Law. As he that hath promised to restore a Sword to him who entrusted him with it, if the man to whom the Promife was made, be mad, he ought not to deliver it, left he thereby create danger to himself, or to some others that are innocent. So neither are we to restore a thing to him that deposited it with us, if the right owner demand it. This I approve of (faith Triphonius) to be Justice, that
that so gives to every man his own, that he detrafts not from the juster claim of another. The Reason whereof is, because such is the force of Propriety, being once introduced, that not to return a thing to the right owner, when known, is altogether unjust.

The Second sign shall be this, When strictly to follow the words of the Promise or Contract is not of it self and altogether unlawful. But when it binds to such things as to a prudent and well-balanced Judgement are too grievous and intolerable: And that whether we respect humanity it self absolutely, or by comparing the person promising, and the thing promised, with the end for which such a Promise or Contract was made. So he that lends a thing for such a time, may require it before that time, if he stand in great want of it: Because it is premised, that no man would willingly do his Friend a courtezie in that, wherein he should do himself a manifest injury. So he that shall promise succours to his Allies, shall be excused in case he be engaged in War at home, so far forth as he shall stand in need of those Forces. In like manner, he that promiseth immunity from Tributes and Taxes, means only from ordinary and annual Taxes, not from those that may be imposed in times of greatest danger, for the defence of the common-wealth. Wherefore it was too loosely said of Cicero, That those Promises were not to be performed, which were unprofitable to him to whom they were made; nor those which did more endanger the Promiser, than benefit him to whom they were made. For the person promising is no competent Judge whether the thing promised will be profitable to him to whom it is promised, unless he be in such a case as is before intimated of apparent madnes: Neither is every damage sufficient to absolve the Promiser from the performance of his Promise, but the damage must be such, as even from the very nature of the act it may be believed. That could it have been foreseen, it would have been exempted. So he that is engaged to do so many days service for another, is acquitted from his engagement, if either his Father or his Son be affected with some dangerous sickness: This was Cicero's opinion in this case, If being retained to plead the cause of thy Client, thy Son shoul in the mean time fall desperately sick, Non est contra officium, non facere quod dixeris; Thou art not in duty bound to attend that Cause. And in this case is that of Seneca to be understood, Then do I break my word, then may I be justly charged with levity, when all things remaining in the state they were in when the Promise was made, I do not perform what I promised. But in case there fell out any unexpected change concerning that whereupon the Promise was made, it gives me liberty to consult anew, and yet I preserve my Faith. I am hourly retained in a cause, wherein I do afterwards conceive that my Father may be demanished; I have promised to take a journey into the Country with such a Companion, but I understand since that the way is inflected with Robbers; I have been engaged my word to be present, and to assist in such a business, but am withheld by the unexpected sickness of my Son, or by my Wives falling into labour: Omnia elle debeat cadem, quod fuerunt cum promitterem, ut promittentis fidem teneas; All things ought to be in the same condition as they were when I promised, to oblige me to do what I did promise. Where by All things, we must understand all things relating to the nature of that Act which is in question. The English did frequently make use of these politick Maxims both with the Hollanders and with the Hanf-towns, as Camden records: For when Queen Elizabeth, by affilting the States of Holland, had drawn down the whole power of Spain against her self, and therefore, for her necessary defence, demanded those vast summs lent them to professure their War: They urging, That that Money was not due, by their Contract, till the end of the War; and that until then, she was obliged in Honour to affil them. She Answered, That a Prince was not bound by his Contract, when for just causes it manifestly turned to the publick detriment; or when it was done by the accident of a new cause; or when a new cause ariseth, which had it been foreseen, would have been provided against. For that every Contract, though sworn, is underfoot with this reserved condition, if matters continue in the same state, but not if they be changed. Which that wise Queen grounded upon the Authority of Seneca, A wife man changeth not his resolution, all things continuing as they were at the time when he made it; nor can be be said to Repeat, because, at that time, and as the case then stood, no better counsel could be followed than was then resolved on. And when the Hanf-towns complained against her to the Emperor, That their privileges were broken in England, and their customs much enhanced: She Answered, That those Privileges were by Authority of Parliament abrogated, as being not convenient for the times, being granted when Traffick and Merchandizes lay dead among the English. And for her Customs, the said; that the Common-wealth could not subsist, if so many other Customs should now be paid by the Hanf-towns than what were paid three hundred years before. And much to this purpose is that of Seneca, Being invited to a Feast, I'll go because I have promised, although it be cold: I will arise to a Wedding because I have promised, although I am not sufficiently refreshed with sleep; but not if I am Eovist, although

XXVII.

Or when some too great a charge ariseth to the Promiser in comparison of that act.

Off. l. 1.

De Eest. l. 4.

Seecam.

aero 1555.
I have promised: Nor will I stand bound with thee for any thing that is uncertain, though thou biddest me, in such cases are indecent to the Exchequer. For in all these Promises there are some tacit exceptions to be understood; namely, if I can, or if I ought to do, if things be as they now are: Effe ut idem status licet exuitur, qui futurum promitterem; Make the case the same when thou exaltest my Promise, as it was when I made it: If any new thing intervenes, it is not levity or unconcern in me if I fail. What wonder is it if a man change his mind and counsel, when his condition is changed. Eadem mihi præfita, 'S idem sum; Make all things the same, and then I also am the same.

There are also (as we have said) other signs of the Will, whereby we may conjecture, That that case was to have been excepted: Among which there are none more convincing, than words spoken or recited, in some place, not where they do directly contradict each other, which is quæstio, whereof we made mention above. But when (as it were) unexpectedly from the very event of things they seem to clash one against another, which the Greeks call των προτεστατων μεταξύ.

Now when such a case happens, which part of the Writing ought to prevail with us, we may be instructed by some rules that Cicero * hath left us out of some ancient and approved Authors, which are by no means to be lighted, yet in mine opinion are they not digested into a right order. And therefore I think fit to place them thus, That that which is permitted do always give place to that which is enjoined: For, as Quintilian, * Semper potentior lex est qua vetat, quam qua permitit; That Law that commands is always stronger than that which permits. Because he that permits any thing is conceived to permit it, unless somehow else do hinder, than what is then treated of; and therefore Plus valet sanctorum, quam permititur, A Decree or Sanction is more prevalent than a Toleration.

Secondly, That what is to be done at a time prefixed be always preferred before what may be done at any time. From whence it follows, That for the most part, that which forbids, is to be preferred before that which enjoins: Because what prohibits, binds us at all times, but so doth not that which commands, unless it be either when the time is express, or that the command comprehends under it some tacit prohibition. Again, that in such agreements as are in their qualities before-named, equal, That should be preferred, which is most proper, and comes nearest to the matter in question: For Particulars are always more efficacious than Generals. And in things prohibited, that which have a penalty affixed, be preferred before those that have none; and those that have a greater penalty, before those that have a lesser. As also that which be preferred has cause affixed, either more honest or more profitable: And in the last place, that which was spoken last be more valid than that which was spoken before. Of what hath been already said, this also must be here repeated, That look what Agreements are sworn unto, must be understood in the most usual Fropriety of Speech: And that all secret reservations and restrictions, more than the very nature of the thing doth necessarily require, be altogether disowned. Wherefore also in case an Agreement sworn shall in effect clash with that which is not sworn, that which was bound by an Oath shall be preferred.

It is also usually questioned, Whether in a doubtful case a Contract ought to be accounted perfect and complete, before the Writings are signed and delivered. For this Mutare alledgeth against the Agreement made between Sylla and Mithridates. To me it is very plain, Thatunlefs it be otherwise agreed, the Writings stand but as the laying Monument of the Contract, and not as any part of the substance of it: If otherwise it must be so express, as in that made with Nabis: Where it was provided, That those conditions should be of force, From that day wherein they should be publish'd by Nabis.

But I cannot admit of their opinion, who hold, That the Contracts of Kings and Free States are to be interpreted, as far as is possible, by the Roman Laws; unless it appear, That among those people the Civil Law, in such things as concern the Right of Nations, hath ever been received for the Law of Nations, which is not really to be presumed.

As to that Quotation moved by Plutarch in his Symposiacs: namely, Whether the words of him that proposeth conditions, or of him that accepts of them are most binding. It appears to me, That seeing it is he that accepts that promiseth, they are his words, if abolishe, and in themselves, that gives form and being to the Contract. For if he regards the words of him that offers conditions affirmatively, he shall be thought to repeat those very words in his Promiseth, according to the Nature of Relatives. But certain it is, That before the conditions be accepted, even he that offers them is not bound to perform them. For until they are accepted, there is no Right acquired, as appears by what hath been already said concerning Promises. And this offering of conditions, is less binding than a Promiseth.


**CHAP. XVII.**

Of the Damage done to one man, through the default of another, and the Obligation thence arising.

I. He that occasioneth the Damage is bound to repair it.

II. A Damage is that which is repugnant to a man's Right strictly taken.

III. A man's Aptitude or fitness for a thing is exactly to be distinguished from his Right strictly taken.

IV. That Damage extends to even the fruits or profits of what was his,

V. And to the increasing of gains, and how.

VI. Of Damage Primarily occasioned:

VII. And of such as are occasioned secondarily.

VIII. Of Damages occasioned by omission primarily:

IX. And secondarily.

X. What they must contribute to the act that are thus far bound.

XI. In what order they are bound to repair.

XII. This Obligation is to be extended to the Damage that shall ensue.

XIII. An example in a Man-flayer:

XIV. In him that offers violence otherwise:

XV. In an Adulterer or Fornicator:

XVI. In a Thief, Robber, and others:

XVII. And in him that giveth the occasion on of a Promise, either by fraud, or by fear that it is unjust.

XVIII. What if that fear be naturally just.

XIX. What if that fear be by the Law of Nations deemed just.

XX. How far the Civil Powers are bound for Damages done by their Subjects; where the question, concerning Prizes taken by Sea, from Confederates, contrary to public command, is handled.

XXI. That by the Law of Nature no man is bound to repair damages done by his Beasts, or Ship, without his knowledge.

XXII. Damages sustained in a man's credit or honour, how to be repaired.

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We have already shewed, that a Right unto a thing may accrue unto us from another, three several ways; either by Contract, or by injuries done us, or by Law. Concerning Contracts I have spoken sufficiently. Let us now come unto that which is naturally due unto us, by reason of wrong done unto us. For every fault (whether it be by Commi- 

**I.**

He that occasioneth the Damage, is bound to repair it.

**II.**

Damage is that which is repugnant to Right strictly so taken.

Damages are happily derived à demendo (i.e. from something that is taken away from us. It is à transmission, when a man receives less than what is his Right, or his own, whether that Right do accrue unto him by Nature meeterly, or by the access of some humane fact, as by Dominien, by Contract, or by Law; by Nature a man's own is his life, (not to destroy it, but to preserve it,) his Limbs, his Reputation, his Honour, and his peculiar actions. By Dominien and by Contracts, how any thing becomes our own, we have been taught, by what hath been already said, and that in respect, as well to things, as to other men's actions. So likewise by Law, there ariseth to every man his own Right; for that the Law claimeth the same or a greater right over the persons, and States of Subjects, than any private man can have over his own. Thus hath a Pupil a Right to exact from his Guardian his utmost care; so hath the Commonwealth from the Magistrate; and not only the Commonwealth, but every Citizen so far forth as the Law shall warrant it either expressly, or by sufficient conformation. But from any men Aptitude or fitness only, because it is not so properly called a Right, and that it belongs to that kind of Justice which is Distributive, no true Dominien or property can arise; and therefore no obligation to restitution: Because that is not instantly his own, for which he is fit or capable. For as Aristotle well observeth, He cannot be said to transfer the rules of Justice properly so called, who out of parsimony relieves not a poor man with his money. This, saith Cicero, is the condition
of a free State, that they can by their Votes, either give to, or take away from any man what they please. And yet he prefently subjoyns, That it sometimes happens that the people may do even what they will, not what they ought, where the word, 'Ought,' is taken in its larger signification.

But here we must take heed, that we do not confound things that are of diverse kinds. For, He to whom the choice of Magistrates is committed, is obliged to the Commonwealth to chuse a man that is worthy; and to exact this of him, the Commonwealth hath a peculiar Right, in so much that if by his evil choice, The Commonwealth sustains any damage, he is bound to repair it: so any Citizen that is not unworthy, though he have no proper Right to any Office, yet hath he this true Right, that he may be a Competitor for it as well as others. And in case he shall be either by fraud or force hindered in this his Right, he may sue for satisfaction, though not to the value of the Office he sought, yet to the value of his uncertain damage. The like may be said of him to whom a Teftator would, but being by fraud or force hindered, cannot give a Legacy. For a capacity to receive a Legacy is a certain Right, and consequently to hinder the Teftator of his freedom to bequeath it, is an injury that requires reparation.

A man shall be underfoold to have less than his due, and consequently to be damned, not only in the thing itself, but in those things, which are properly the fruits arising from it, whether it be perceived or not; if he was to have perceived them, deducting the costs, which he was at in the cheapening of the thing, or the charges which he necelfarily should have been at in the perceiving of them, according to that rule, that forbids us to make our selves gainer by other mens loffes.

So also the hopes of gain, by which our own is valuable, not as if it were gained, but according to the nearness of our hopes to gain it; as the nearness of the Harvest to him that in hopes thereof towed his own Land.

Befides him that immediately doth the wrong, others also may be obliged to reparation, either by doing what they ought not, or by not doing what they ought to have done. 

By doing, and that either Primarily, or Secondarily: Primarily, as he that commands the doing of it, he that being required, gives his consent unto it, he that affifts in the action, or is ready to receive what is injuriously taken away, or that shall participate of the wrong done, by any other means.

Secondarily, they are bound to reparation which give their advice before it be done, or that commend them that did it, being done. For as Tertius in his Oration to the Germs observes, He that commends a Malefactor, even he is to be reputed the Author of the fact: And as Ulpian speaks concerning an evil Servant, whom (if upon the discovery of his intentions, to run away from his Master, or to steal any thing from him) another man shall commend, That man is bound to give satisfaction; for we ought not by our commendations to encourage a Malefactor to sin. For, as Cicero observes in his Philosophies, What difference is there between him that perfwades to an unjust act, and him that commends it, being done?

By not doing what he ought, a man may be bound to reparation two ways, Primarily, or Secondarily: Primarily, as when he that hath a Right properly so called, expressly to forbid the doing of it, or to defend him who hath the wrong done him, doth it not: for such a man the Chisholm Paraphrase calls obftrurator, a strengthener of wickednes, qui non vetat cum persif. ipse: He that hinders not when he may, commands. He is not only guilty that sets fire to his Neighbours house, but he also, who could have hindered it, but would not.

Secondarily, he that doth not disfiffide, when he ought, or shall conceal the fact which he ought to discover. In all which cases the word debet (i. e.) ought, is to be referred to that which is a man proper Right, strictly taken, whereunto Commutative Justice hath respect; whether that Right do arise from the Law, or from any quality in the person. For if it be due only by the rule of Charity, the omission thereof, may be a sin, but not such as obliges to reparation; for to this it is required that there should be some proper and peculiar Right, as we have said before.

Where also it must be observed, that all these do stand obliged, as we have said, if they are truly the cause of the damage given, (i. e.) if they do contribute any thing of D do 

moment X. What is required as to this.
Damages done to be repaired; and by whom.  

BOOK II.

moment to either the whole or any part of it. For if it shall evidently appear, that he that did the wrong had certainly done it, even without their act or neglect, as it often falls out in those of the Second order, and sometimes in those of the First, They are not bound to reparation. Which notwithstanding is not so to be understood, that if there wanted not others that would advise and help, they that did so, are not obliged; if he that occasioned the damage had not done it without Counsel and Assistance. For even though others also, if they had counselled and assisted, had been partakers of the sin, and so obliged to reparation.

X. In what order they are bound.

But they are principally bound, who by their own command, or by some other means, did compel another to do the wrong: But if they fail, then he that did the fact, and after him the rest: Every one that contributed aid or advice to the fact, are bound to make reparation, for the whole damage, if the whole fact proceeded from them, though not from them alone.

XI. The obligation extends to the Damages that are consequent.

He that is guilty of the fact, is also guilty of all the evil consequences that ensue by reason of that fact. Seneca in one of his Controversies handles this question, putting the case in one who setting fire to a Plane-Tree, burnt thereby the houes adjoining, and gives his opinion thus, Although thou dost not intend thy Neighbours to suffer an injury, yet art thou bound to satisfy the whole, as if thou hadst done it purposely; for thou oughtst to be innocent, as to every part of the wrong done, that would excuse himself by his imprudence. Arianistes King of Cappadocia damming up, in wantonness, the mouth of the River Melanus, caused the Waters to swell and rage with that violence, that forsoeing its way into the River Euphrates, did so swell that River also, that washing away a great part of the Cappadocian Land, it did much harm to the Inhabitants of Galacia and Phrygia: which matter being referred to the Romans, Arianistes was adjudged to pay them 300 Talents to satisfy the damage thereby sustained.

XII. An example in an Homicide:

For examples let these suffice. First, He that kills a man unjustly, is bound to pay the charge of Physicians and Chirurgeons, if any such there be; yes, and to nourish all that depend upon the person killed, for life, and lively-hood, as Parents, Wife, Children, and to give satisfaction proportionable to the hopes of that Aliment, consideration being had to the Age of the person killed, and to other Circumstances. As we read of Hercules, who the better to expiate the Murder of Iphitus whom he had slain, paid a great sum of money to his children, for the wrongs they suffered by their Fathers death. For, as Michael Ephesius well observes, What is so paid, is in a manner paid to him that is killed. We speak here of an unjust Homicide, (i.e.) of him who having no lawful power given him, shall commit such an act of violence, that occasions the death of the party injured; whereof if a man shall have a Right to do it, but shall offend against Charity, as he that will not fly away, he shall not be obliged to reparation. The life of a Freeman is invaluable, but otherwife of a Servant who may be sold.

XIII. In him that maineth another:

So he that hath mained a man, and deprived him of one of his Limbs, is bound to pay all charges, and to satisfy him for the loss of his Limb, by reason whereof he is incapable of making that improvement of his labour, as otherwise he might have done. But as I said (before) of the life, so here I say of the Limbs of a Freeman, that they cannot be valued. The like may be said in case of false Imprimis.

XIV. In an Adulterer:

So also the Adulterer and Adulteresses are bound, not only to save the Husband harmless as to the Childs nourishment, but to repair whatsoever Damage the Children that are Legitimate, shall afterwards sustain by any fare or portion, that that Child shall claim in the Inheritance. If a man shall either by force or fraud vitiate a Virgin, he shall be obliged to pay her so much as the shall be thought to be demanniéd in her hopes of Marriage: and if he obtained the use of her body by the promise of Marriage, he stands obliged to perform his promise.

XV. In a Thief or Robber, and others:

A Thief or Robber is bound to restore the thing taken away, together with its natural increase, and the ensuing Damage, or the forfeating of his gains; but if the thing taken away do perish, then the value of it, not to the highest rate, nor to the lowest, but moderated. Among these, we may also rank such as defraud Princes of their lawful Cautions, and Contributions. In like manner are they bound to reparation that have wronged others, by either their unjust sentence, or unjust accusation, or by their false Testimony.
As also, he that shall either by fraud, force or unjust fear urge a Contract or a Promise from any man, is bound to make reparation to the full: For hereby he robs the man he deals with of a double Right: First, by the nature of Contracts, he had this Right, That he ought not to be deceived; And then by the natural liberty that every man should have, he ought not to be enforced, or unjustly alarmed. And among these, we may likewise range those that will not perform, what by their Office they are bound to do, without Bribes.

But he that hath given just cause why he ought to be, by force or fear compelled, hath reason to blame himself. For an involuntary act arising from a voluntary, is naturally reckoned for a voluntary.

But as, by the consent of Nations, all Wars made and denounced by the Suprem power on both sides are reputed just, as to to the external effects (whereof we shall speak more anon) so is the fear of such a War, so far reputed just. That whatsoever is obtained thereby cannot be required back. In which sense, that distinction of Cicero's may be admitted, which he makes between an Enemy, with whom we enjoy by the consent of Nations many common Rights; and a Thief or Pirate. For if these extort any thing from us by fear, we may require it back, unless we are bound by Oath not to do it: But if we cannot do from an Enemy. Wherefore what Polybius writes concerning the Second Punic War (namely, that the Carthaginians had just cause to make it, because the Romans (by denouncing War against them, whilst they were engaged in another War against their Seditious Mercenaries) had enforced them from the Island of Sardinia, and a great sum of money) hath indeed some shew of Equity, but is not agreeable with the Common Right of Nations, as we shall elsewhere prove.

Kings and Magistrates are obliged to reparation, if they do not make use of such remedies against Thieves and Pirates, to suppress them as they may, and ought to do: For which neglect, the Servants were condemned by the Amphictyons. I remember that this case was once proposed amongst us, when our Estates having granted Letters of Marry against our Enemies, some of those to whom these Letters were granted, abusing themselves and us; had robbed our friends, and leaving our Country, betook themselves to the Seas, and though recalled, would not return: whence arose this question, Whether our States were bound to repair the damages, either because they made use of such wicked instruments, or because they did not require from them sufficient caution that they should not transgress their Commissions: Whereunto I gave this answer. That they were obliged to no more than to punish them being found, or to deliver them up: And besides, to take care that reparation should be made out of the Goods of the Delinquents. For that the States were not the causes of the depredations, nor did they participate of them: that they had forbidden them by severe Laws to wrong their friends; but to require Caution from them, they were not by any Law obliged, seeing that they might empower all their Subjects without any Codicils, to make what spoil they could, of whatsoever was their Enemies, as had been anciently done: Neither was this permission, the true cause of the wrongs done unto their friends; seeing that private men might arm their Ships, and put out to Sea, even without permission. Neither could they foresee that these men would prove wicked: Nor could they altogether avoid, the making use of wicked men; for then it was not possible for them to raise an Army: Neither if their Souldiers either by Sea or Land did injure their friends, contrary to the Command of the Suprem Magistrate, were they obliged to reparation, as might easily be proved by the Testimonies of France and England. (Yet in a League between Francis de Valois King of France, and Henry the Eighth of England, it was agreed the better to prevent Depredations by Sea, that no Merchant of either Nation should depart out of their Ports without giving Caution to their respective Admirals, that no wrong or molestation should be done by Sea to either of their Subjects.) But that any man should be bound to repair the Damages which his Servants shall without his fault, and against his command, do unto others, belongs not to the Law of Nations, by which this cause ought properly to be judged; but to the Civil Law, and yet not in the general, but as it is introduced for some particular reasons against Mariners, and some others. And thus hath this case been determined by the Judges of the Supreme Assembly, against certain Pomeranians, and that according to Precedents of things of the like nature, two ages before.

XVII. In him that by fear or fraud causeth a Promise.

XVIII. What if the fear be naturally just.

XIX. What if the fear be held by the Law of Nations, for just.

XX. How far the Civil power is bound by Damages done by their Subjects, by reason of Letters of Marry granted them.
This also is worthy our observation, that it proceeds from the Civil Law, and not from
the Law of Nature, That we deliver up our Beast, or Bond-slaves to punishment,
which have endamaged our Neighbour. For the owner of them being innocent is
naturally bound to nothing, as neither is he, whose Ship without his fault, falls foul
and hurts another; though by the Law of diverse Nations, as well as ours,
such Damages are usually divided between both, because it is very difficult to be
proved.

But the wounds we receive in our Honour, or Fame, as by stripes, reproaches,
curses, and such like, must have their proper cures. And in these no less than in theft,
and other crimes, the hainousness of the fact is discerned by the effect. For as in
those, our reparation consists in the punishment of the thief; so in this, The Damage
we sustain is repaired by confession of the fault, and by exhibiting all due Honour to
him who is wronged, and the publick Testimony given both of his innocence, and
our own repentance, and such like means: Although the offender in this kind may
be punished in his purse, if the injured person desire it, because money is the Common
Standard whereby all things tending to profit, are measured.
Of the Rights of Embassages.

1. There are some Obligations that arise from the Law of Nations, as the Right of Embassages.

11. Among whom this Right takes place.

11. Whether an Embassage be always to be admitted.

IV. Against such Embassadors as endeavour to raise Sedition, our defence is lawful, but not the excusing of punishment.

V. He is not obliged to the Rights, of an Embassage, to whom the Embassador is not sent.

VI. An Enemy is bound, if the Embassador be sent unto him.

VII. Embassadors not subject to the Law of retaliation.

VIII. The Rights due to Embassadors, are due also to their Companions, and followers, if the Embassador please:

IX. And to their movable goods.

X. Examples of Obligation where there is no Law to enforce.

XI. How far by the Law of Nations, this Right of Embassages is in esteem.

We have hitherto discoursed of such things, as by the Law of Nature are due unto us, interfering some few things which the voluntary Law of Nations hath suppersaddled to the Law of Nature. It remains now that we come to such obligations, as the voluntary Law of Nations hath of it self introduced: Whereof the chiefest head is of the Rights of Embassages. We have in all Histories, mention made of the Sacred and Inviolable Rights of Embassages, of the Sanctimony of Embassadors: The Right of Nations peculiarly due unto them: The Rights of Embassages Sacred amongst all Nations.

Sanctum populis per facula Nomen.

Ages and Nations do this name revere.

faith Papinian. If any man shall strike an Embassador, though sent from an Enemy, he is said to violate the Law of Nations, because Embassadors are accounted Sacred, faith Pomponius. And therefore if whilst an Embassador from any Nation, is resident with us, War be denounced against them, it is agreeable to the Law of Nations that (if he please) he may remain with us. Quintus Mucins would have it that Fregius an Embassador, to be delivered up to that Enemy, whose Embassador he was. Josephus also highly extolls the Sacred priviledges of Embassadors, who are honoured with the same name and title, as are the Angels, who are Gods Embassadors.

Corpora Legatorum Sancta, The persons of Legats, faith, Varro are Holy. So likewise Gr. Varo 3.
coro. The Rights of Embassadors are guarded by all Laws both Divine and Humane, whose very name is so venerable, that it secures their persons not only among the Laws of their friends, but a mong the very weapons of their Enemies. Wherefore to violate this Right, is not unjust only, but impious, ἡν δὲ αἰτία, as Plutarch calls it. Wherewith accordas that also of Josephus, where he faith, That the very name of an Embassador is so Sacred, that it is able to reconcile one Enemy to another: For what can argue more impity, than to kill Embassadors, interceding for Peace. And to speak generally, faith Tertul, Embassadors are reverenced among all Nations, though Barbarous. And good reason, For, even in the midst of War, they are the sole Mediators for Peace, and he that assumes the Office of an Embassador, doth for that time put off the condition of an enemy.

But
Of the Rights of Embassages.

BOOK II.

II.

Among whom this Right takes place.

But yet we must in the first place, know that this Right of Nations, whatever it be, belongs to such Legats only, who are sent by such as have the Sovereign power, in both Nations between themselves. For such are sent from Provinces, particular Cities, or other subordinate powers, are governed not by the Law of Nations, which is between diverse people, but by the Civil Law. An Embassador in Livy calls himself the Publick Messenger of the people of Rome: And in another place, the Roman Senate declares that the Right of Embassages was granted, not to a Citizen, but to a Foreigner: And Cicero to prove that they ought not to send Embassadors to M. Anthony, faith, Non enim cum Hannibale rest, buste republicae, sed cum civi: For we have not now to do with Hannibal, a publick Enemy, but with a Citizen and a Subject. Now what is meant by a Foreigner, Virgil will inform us, as well as any Lawyer can do:

A Foreign Land is that, as I suppose,
Which being free, to us no duty owes.

But they that are Confederates, though upon Terms very unequal; yet because they are sui juris, a free people, have likewise this Right of sending Embassages: Yea, and they also that are partly Subjects, and partly free, for that part wherein they are free. But such things as are conquered in a solemn War, and driven out of their Kingdoms do lose, together with their other goods, this Right of sending Embassadors. And therefore did Paulinus Emilinus, having conquered Persians in open War, detain the Heralds, which he sent unto him. But yet, in Civil Wars necessity doth sometimes plead for the admittance of this Right, though irregular; As namely, when the people are fo equally divided into parts, that it is an hard matter to judge, in whether part confficts the Right of Empire; or when two persons with very equal titles, contend for the Succession. For in this case, one Nation for that time may be accounted as two. Thus are the Flavians accused by Tacticus, that in their Civil discord, they had violated the Right of Embassadors, Sacred even among Barbarous Nations, in the Vitellians. And Magnesius in Zosimus did long debate it in his mind, whether he should dismiss Philip, who was sent him on an Embassy from Constantin without answer, or extempore to the privileges of Embassadors, detain him. Pirats and Thieves being enemies to Civil Society, can have no benefit by the Law of Nations. Spartanus in Appius offered to enter into a League with Carthage, but was rejected with scorn; and Tiberius, when Tafrarius, sent Embassadors to him, was highly vexed, to see a Traitor and a Thief to treat with him, after the manner of Enemies: Which are the very words of Tacticus. Yet sometimes these also are admitted to the Rights of Embassages, upon their Faith given. As of old those Fugitives, in the Pyrenean Woods, were, whom Cesar mentions. Yet was this a particular indulgence given at that time by him, which by the Law of Nations was not due, nor ought to be given to Subjects.

There is a twofold Right due to Embassadors by the Law of Nations:

First, that they be admitted; Secondly, that they be not injured. As concerning the former, Livy brings in Hamnus inveighing against Hannibal, in the Senate of Carthage, thus, Our goodly General refuseth to admit into his Camp Embassadors coming from friends, and for friends. Jun Gentium suffultur, He hath broken the Law of Nations: which notwithstanding must not be understood so largely as if none should be denied; for a Prince may deny an Embassador admittance; and he may command him to depart his Kingdom, if he behave himself feditiously, but that none should be without cause denied: Now causes there may be, First, from him that sends, Secondly, from him that is sent, and Thirdly, from the matter of Embassage. As to the first, we read that Pericles dismiss Matfigus, the Lacedemonian Embassador, beyond the Territories of Athens, because he came from an Armed Enemy. And the Roman Senate denied admission to the Carthaginian Embassador, because they had an Army in the heart of Italy. So did the Athenians to the Embassadors of Perses, because he attempted a War against the Romans. The like did Jullian to the Embassadors of Teutus, and the Goths in Urban to the meffengers of Bratianus. And the Embassadors of the Scythians, because they were a people notoriously wicked, were all in places repulsed, as Polybius testifies. As concerning the second
cond caufe (i. e.) from the perfon went; an example we have in Theodorus the Atheist, to whom Lyons was refused to give Audience, though he came as an Em- bassador from King Poland: The like hath been done to others, for no other caufe but personal hatred. The third is, when the ground or reason of him that sends is suspected to move Sedition, as was that of Rabbothiel rejected by Hezekiah, and the like: Or when the matter or form is not well suited to the dignity of the perfon with whom we treat; or not so well timed. So the Romans forbade the Azilians to send out any Em- bassadors without their Generals permission: And Persians was forbidden from sending any Em- bassadors to Rome, but only to Lici- nius; fo they commanded the Em- bassadors of jugurtha to depart out of Italy within ten days, unless they came to deliver their King and Kingdom into the power of the Romans. So the Emperor Charles the Fifth commanded the Em- bassadors sent to denote War against him, from France, Venice and Florence, to be conducted to a place thirty, miles distant from his Court, as Guicciardin records it. And thus may those Ordinary Em- bassadors which are constantly resident in most Courts, be worthily rejected as unnecessary, and a new uptarft cuftome whereof former Ages were wholly ignorant.

Concerning the latter privilege of Em- bassadors, namely, that they should not be molested, the question is more arduous and knotty; and by the belt Wits of this Age, variously handled. In the flattering whereof, they have respect, First, To the per- sons, Secondly, To their Attendants, Thirdly, To their Goods. As to their persons, some think, that they are to be protected against all unjust force only, esteeming their privileges to be underftood of Common Right. Others are of opinion, that the per- sons of Emperors are not for every caufe to be molested, but only when they them- selves do violate the Law of Nations, which opens a door so wide, that all delin- quencies are punishable in Emperors, except such as are committed against the Civil Law. For in those committed against the Law of Nations, are contained even those that are committed against the Law of Nature. Others do yet restrain this force to those, who shall be found to act any thing against the State of the Common-wealth, or against the honour and dignity of the perfon to whom they are sent: which some think to be of dangerous confequence; and therefore would have complaint made to him that sent them, and the Em- bassadors sent home, to be by him punished. Others there are, who think it fit in this cafe to appeal to other Kings and Free States, that are not concerned; defiring their advice therein, which indeed may stand with prudence, but not to be imposed upon us as a Law. The Arguments which every one of these do bring to strengthen their several opinions, do conclude nothing cer- tainly: Because this Right is not grounded upon reasons that are certain, as the Law of Nature is, but it receives its bounds from the content of Nations. Now the Na- tions may either altogether provide for the safety of Em- bassadors, or with some cer- tain exceptions. For advantages may by either of these arise to the Common-wealth. By this latter, the punishment inflicted upon such as notoriously offend, deters others, and secures the peace of that Nation. By the former, the profit arising to the State by Em- bassies, which are the more easily and willingly undertaken, when the per- sons sent are encouraged thereunto, as knowing that the greatest care that can be, is taken for their security; we are therefore to observe, how far forth the Nations did agree in this point; which cannot be evinced by examples alone. For of these we have enough extant on either side; we must therefore have recourse herein, as well to the Judgement of the Wifd Men, as to our own most probable conjectures. For the Judgement of the Wifd Men are guided by two notable precedents; one out of Livy, the other out of Salut. That out of Livy, by the Em- bassadors of Tarquin, who pretended only to treat with the Senate about some of Tarquin's Goods, but were found conspiring with the Citizens to betray the City. And when it was moved in the Senate, what should be done with them, it was at length resolved on, That though they desired to be proceeded against as enemies, yet salut trium Gentium, the Law of Nations must be preferred. Whence we may conclude, That by the Law of Nations, Protection is due unto Em- bassadors, though they should be found plotting against the State they are sent unto. That in Salut, both more immediately respect the Concom- mitants of Em- bassadors, than Em- bassadors themselves; and yet by an Argument drawn from that which is lefs credible, to that which is more, may serve to prove, what the Law of Nations allows to Em- bassadors in the cafe aforesaid. Salut speaking of Bo- milcas, who came to Rome as an All?iant in the Em- bassage, but was found Riring up the Citizens to Rebellion, faith thus, Fit renis magis ex aquo bonoque quam ex jure Gen-
tions; *He was made Guilty,* rather by the *Rules of Equity,* than by the *Law of Nations.* Where by *equum & bonum,* is meant the mere *Law of Nature,* which requires, that he that doth evil, should suffer for it being found. But the *Law of Nations* excepts from this General Rule, *Embassadors,* and such as (like them) come upon the security of the *Publick Faith.* Wherefore it is contrary to the *Interett of the Law of Nations,* that *Embassadors* should be held guilty, as many other things are, which are permitted by the *Law of Nature.* Our conjectures also may be thus guided. Most probable it is, that the privileges granted to *Embassadors,* are somewhat more than what is due unto others by common right. But in case they are no longer to be secured, than whilst they live regularly, what have they more than others? Besides the benefit that accrues unto the *Common-wealth* by securing their persons, doth by much preponderate that which we may hope for in their punishment. For his punishment may be required of him that sent him, if he be willing: which if refused, then we can but make War upon him, as being accesseary to the crime by his approving it. But some will object, That it is better that one should be punished, than a multitude engaged in a War. But if he that sent the *Embassador* do approve of his Fact, the punishment of the *Embassador* cannot free us from the Danger. (Now whether it be safest for the *Common-wealth,* to connive and dishumour the fact, or to run the hazard of a War, will be the question.) On the other side, the safety of *Embassadors,* would be but slenderly provided for, if they were to give an account to any, but unto him that sent them. For since the designs of them that send *Embassadors,* and of those to whom they are sent, are for the most part diverse, if not contrary, it cannot possibly be, but that some of their Actions will seem to be criminal. And although some are so manifest, as not to admit of any doubt, yet is the universal danger sufficient for the equity and benefit of an universal Law. Wherefore mine opinion is, That by the *Convent of Nations,* that *Common Custome* which requires, that every man that refides in a *Foreign Country,* should conform himself to the *Laws and Customes* of that Country, should except *Embassadors,* who as they are imagined to be the persons of them that send them: (for so speaks Cicero of a certain *Embassador,* *Senatus Factum secum attulerat,* He brought with him the Majesty of a Senate, the Authority of a *Common Wealth.*) So may they be imagined to live in their own Country; and therefore not bound by the Civil Laws of the place they are really in. Wherefore if the offence be such as may safely be flighted, it is either to be diffambl’d, or the *Embassador* commanded to depart the Kingdom; which (as Polybius tells us) was done unto him who procured the Flight of the *Hostages* from Rome. The like was done by *Stephen King of Poland,* to the *Muscovite Embassador,* and by Queen *Elizabeth,* to the *Scottish* and *Spanish Embassadors.* For when *Mendoza,* the *Spanish Embassador,* was found practising with *Throckmorton* and others to bring in a *Foreign Power* into *England,* and to depose the Queen; he being a man of a *Turbulent Spirit,* and abusing the privileges of an *Embassador,* was commanded to depart the *Reign.* But when the Bishop of *Roffe* delegated *Embassador* from the imprisoned Queen of *Scotts,* was found designing means both within the Kingdom of *England,* and without, to raise Rebellion, and to procure a *Foreign Invasion:* it being demanded of the most Learned Civilians of that Age, Whether an *Embassador* raising Rebellion against the Prince, to whom he was sent, might enjoy the privileges of an *Embassador:* it was answered, That he had thereby lost his privilege, and might be punished: as *Camden* records it *anno 1571.* and 1584. And we may also remember, that at another time the *Romans* caused the *Tarentine Embassadors* to be whipt with Rods, for conveying their hostages out of *Rome,* but this was done, because the *Tarentines* being conquered, began then to be under the Jurisdiction of the *Romans.* So we read of *Charles the Fifth,* that he commanded the *Embassador* of the Duke of *Milan,* as being his Subject, that he should not depart his Court without leave, as *Guicciardine* relates it. But in case the Crime be heinous and menacing present danger to the State, then is the *Embassador* to be sent back to his Master, with demand, That he either punish him, or deliver him up to be punished: as we read of the *Gauls,* that they demanded the *Fabri* to be delivered up unto them. But, as I have often said before, *All humane Laws* are *so made,* that they oblige not in *extrem necessity,* the same may also be said of these *Rights of Embassadors,* Wherefore that we may prevent some imminence danger, especially to the *Common-wealth,* if no fitter means can be thought on, we may both apprehend and examine him; as the *Roman Consuls* did the *Embassadors of Tarragon,* All intercoupe by Letters being in the first place prevented, as *Livy* directs. *Pelopidas* was imprisoned by *Alexander Pherus,* for that being an *Embassador,* he fired up the *Thebians* to liberty. But in case an *Embassador* shall attempt to assail another man by force of Arms, surely he may be killed; not by
by way of punishment, but by way of Natural Defence. So the Gaules might have killed the Fabii, whom Livy brands, as being the Infringers of humane Right. Wherefore when the Herald in Euripides attempted by force to rescue the Suppliants, he was by force relusted; and when the Herald demanded of him,

**Dar'st thou, an Herald, hisher sent, so stout?**

He was answered,

**Tes, if that Herald first begin so fight.**

And because that Herald did act by Force and Violence, he was slain by the people of Athens, as Philostratus records in the Life of Herod. By the like distinction, doth Cicero resolve this Question, Whether a Son ought to accuse his own Father being a Traytor to his Country? Namely, if the Danger be great and imminent, he ought by way of prevention; but in case the danger be past, he ought not by way of punishment for the Fact. The very Name of an Embassador, faith Theodatus the Goth to the Emperor Justinian's Embassador, is with all men held as sacred and honourable; which honour they may justly claim, whilst they uphold their dignity by their modesty. For most men are of opinion, that it is lawful to kill an Embassador, if he be injurious to the person of him to whom he is sent, or shall defile himself, by violating the Rights of Marriage. And when some Embassadors did allege, that they were so far from the fulpicion of committing Adultery, that they could not far abroad without a Guard, they prudently added, That if an Embassador did deliver no other Message, than what he received from his Master, though it were never so unpleasant, he was not faulty, but he that sent him: For there was nothing committed unto him, but that he should faithfully discharge the Commands that were given him.

This Law of securing Embassadors from Force or Violence, obligeth him to whom they are sent, at least when they are admitted; as if from that time, there had passed between them a Tacit Covenant. But before they are received, they can claim no such priviledge: because he to whom they are sent, may happily declare, that they shall not be received: And if so, then they shall be accounted as enemies: As the Romans premonified to the Etruscans, and as the same Romans long since, by an Edict signified to the Vejentine Embassadors, That unless they departed the City, they would shew them no more mercy, than Tolumnius their King had shewed to the Roman Embassadors, whom he commanded to be killed. And as the Samnites declared to the Romans, namely, That if they entered into any Assembly in Samnium, they should not depart in Safety. This Law therefore, reacheth not unto those through whole Territories Embassadors presume to pass without Licence. For if they are going to their Enemies, or coming from them, or do otherwise attempt any Act of Hostility, they may be even killed. Thus did the Athenians serve the Embassadors passing between the Persians and the Spartans: So did the Illyrians, those that went between the Etruscans and the Romans: Much more being taken, may they be bound and kept in Prison; as Xenophon past Judgement upon some, and Alexander against those which were sent from Thessals and Macedonians unto Darius; and the Romans against the Embassadors sent to Hannibal. But if no such thing be, and yet the Embassadors be evil treated, the Law of Nations, whereof we now speak, is not thereby violated: but the honour of those Princes, either from whom they came, or unto whom they were sent, is thereby wounded, and all friendship with them broken. Thus writes Juvine concerning Philip the latter King of Macedon, That he sent his Embassador with Letters to controul Friendship with Hannibal, who being taken, and brought before the Roman Senate, was deferse with safety. Not in honour to the King, but left of a doubtful Friend, they could thereby make him their certain Enemy. But it is otherwise in case any Prince shall lay in wait to surprize the Embassador of another Prince, without his own Territories; for this is a violation of the Law of Nations; as is plain by the Oration of the Theffalians against King Philip recorded by Livy.

Ee        But
VI. But on the other side, the Embassador being admitted, the Law of Nations protects the person sent, even among those Nations that are in Actual Arms one against another, much more among such as are barely Enemies. It is very true, what Diodorus Siculus faith, *That Herolds enjoy Peace in the midst of War.* The Lacedemonians who killed the Herolds, sent from the Persians, are said to have broken the Law of all Nations. *If any man shall slay an Embassador coming from an Enemy, he shall be judged (faith Pomponius) as one that hath violated the Common Right of all Nations; because their persons are generally held as sacred.* And Tacitus calls this Right []], whereof we now treat, the Right of Enemies, the Sanctuary of Embassadors, and the Law of Nations, approved by God himself. So likewise Cicero, *Nomine Legati inter hosstes incolumis effe debet? Ought not Embassadors to be secured, though among Troops of Armed Foes?* And Seneca in his Books of Anger, *He offered violence even to Embassadors, thereby scrupling at the Law of Nations. A villainous Act, a wicked Cause, an impious Murder,* as Livy calls it, *in the Story of the Eidenates affailingating the Roman Embassadors: And in another place, when their Embassadors were brought into great danger, he faith, *Ne bellis quidem jure relictâ sunt; They had not left amongst them so much as the Rights of War.* So Curtius, *He sent Embassadors to compel them to peace, whom the Tyrians killed and threw headlong into the Sea, contrary to the Law of Nations. And deferredly: For even in War many things fall out, which cannot be transacted but by Embassadors; and very hardly can Peace at any time be made without them.*

VII. Another Question doth usually arise, namely, Whether a Prince may retaliare the wrongs done unto his own Embassadors, upon the Embassadors of him who did that wrong? And surely, we may find in Histories, many examples of revenges taken in this way. And no marvel, for Historians do usually record, not only things that are justly and piously done, but those also that are done unjustly, in heat of anger, rashly, and impotently. But the Law of Nations doth not only carefully provide for the honour of the Person sending, but for the security of the Person sent. So that there is, as it were, a silent Contract made between the Embassador sent, and the Prince to whom he goes. And therefore though there shou'd be no injustice done, in respect of the Prince that sends his Embassador, as having justly deferv'd it for the affront given him in the wrongs done unto his Embassador; yet to the person sent there would be done a manifest injustice, because by virtue of that tacite agreement he might justly claim his Indemnity. And therefore it was not only magnanimously, but justly done by Scipio, according to the Law of Nations, who though the Roman Embassadors had been very hardly used at Cartagin, yet when the Romans brought the Carthaginian Embassadors unto him, demanding what should be done with them, made answer, *Nihil tale qualis fulationis sit ad Carthaginensibus; Nothing of that which the Carthaginians did unto the Romans.* Or according to what Livy adds, *Nihil se fuctorium substantis populi Romani indignans; That he would do nothing unworthy of the Roman Discipline. Whereunto Diodorus adds this Reason, *Left what we blame in them, we justify in our selves.* And the Romans themselves, though they were not ignorant of what the Carthaginians had done, yet disimpt their Embassadors in safety. Thus did Constatius remit Titusmann, being sent unto him by Magnenius; though his own Embassador, Philip, sent unto Magnenius, had been hy him detained, as Zosimus testifies. And when long before the Roman Embassador, Cornelius Asmus, was put in Chains by the Carthaginians, and Hannus the Carthaginian Embassador, being at that time in Rome, was afraid of the like measure, the Consuls stood up in the Senate, and thus bespeak him: *Ifo tu metus, Hannus, fides Civitatis nostra liberis; Let the Faith of our City, Hannus, free thee from this fear.*

VIII. Not only the Embassador himself, but his Followers and Goods are to partake of the same privilege (if he pleafe.) And therefore the Ancient Form of words used by Embassadors and Herolds unto the Kings to whom they were sent, were thefe, *O King, dolf thou admit of me, as the Royal Messenger of the People of Rome, together with my Goods and Followers.* And by the Julian Law, not only they that offered violence to the perrons of the Embassadors themselves, but they that injured any of their Attendants, were found guilty, *De vi publica,* Of violence done by force and arms. But
But this Sanctuary belongs unto them, but as they are Attendants to the Embaßadour, and therefore no farther due than he shall please: Wherefore in case any libelous crime be committed by them, they are required to be delivered up by the Embaßadour to punishment: but they are by no means to be taken from him by force. Which, when once done by the Achslants, who seized upon some Lucademonians, who attended upon the Roman Embaßadours, the Romans presentely cried out, That they had violated the Law of Nations. Whereunto also we may refer the judgement of Saloß concerning Bamilear, which we have formerly quoted. But if the Embaßadour shall refuse to deliver him, then we are to proceed in the same manner, as is before prescribed against the Embaßadour himself. But whether the Embaßadour have jurisdiction over his own Family, or whether his House be a Sanctuary for all such as shall fly unto it for refuge, depends upon the pleasure of him to whom he is sent; for this belongs not at all to the Law of Nations.

The movable Goods also of an Embaßadour, and whatsoever else shall appertain to his person, are not to be received in pawn, or attached for any debt; neither by any ordinary course of Law, nor by the hands of the King himself (which some hold as the truer opinion.) For no force or compulsion must be, by any means, used against him or his; that so he may enjoy an absolute and perfect security. And if he shall have contracted any debt, and have no real Estate (as it usually falls out) he must only be fairly intreated to discharge them; which if he refuse, then is he that sent him to be likewise intreated to pay them. But if neither will do it, then in the last place we must flee to such Remedies, as are provided against such Debtors, as do reside in Foreign Countries.

Yet is it no breach of their priviledge, that their Coffers be searched at their first entrance, in case it be according to the custom of the Country whereunto they are sent: As it happened to Sir Thomas Chaloner in Spain, who complaining thereof to Queen Elizabeth, and desiring to be recalled, was prudently answered by that most wise Queen, That an Embaßadour should take all things in good part, so as his Prince's Honour was not directly violated.

Neither is there any cause to fear (as some may imagine) that if the case be thus with Embaßadours, no man will trust them, or make any Contract with them: For the King himself though he cannot be compelled to any thing, yet never wants Creditors (if they give good prices.) And among some Nations, as Damascus informs us, it is customary, That as to such debts as are contracted upon trust, there is no remedy provided by Law, no more than there is against men that are ungrateful: So that men in those parts are compelled, either to pay readily for what they buy, and on both sides to fulfill alike all their agreements, or to content themselves with the bare faith and credit of the Debaßor. Seneca seems to envy the happiness of those Countries, by witling the same custom in all places: I would to God (faith he) that we could persuade all people, that Moneys lent upon credit should be recovered only from those men who were willing to pay, and that no stipulation should bind the Buyer to the Seller, and that no written Contracts or Covenants under Hand and Seal, should be preferred, but rather that the performance of them should be left to the Faith and Honour of the Debtor. Apian relates of the Persians, That they hated the borrowing of money, as being an inlet to Fraud, Falsehood, and Perjury. And Anlan reports the very fame of the Indians, with whom agrees Strabo, in these words, Judicia non esse nisi de cade & injuria, &c. There are no Indications unless it be for Murders and Injuries done, because it is not in the power of any man to avoid these: But as to Contracts and Agreements, it is in the choice of every man to make them or to refuse them; and therefore if any man break his Faith with us, we are to bear it patiently, and to learn rather to be wife, in taking heed before hand whom we trust, than by our folly to fill the City we live in with Law-suits. It was also wisely enacted by Charondas, That no man should have his Action at Law against that man, whose Faith he thought fit to take for the price of what he sold him, which Plato likewise approves of. This was also observed by Arifotle, In some Countries (faith he) there is no recovering of such Debts by Law-suits.
for they conceive that men ought to acquiesce, and to be contented with the faith of that
man whom they thought worthy to be trusted. So in another place, Some Countries there
are where the Laws do forbid a man to recover by Law, that which he hath trusted upon
the Faith of another; as if he with whom we have made any Contract, and on whose faith
we have taken, were privately only to be dealt with. Thofe Arguments which from
the Roman Laws are brought againft this opinion, are to be referred not unto our
Embafadours, but unto such as are sent from Provinces, or from particular
Cities.

X I. Prophane Histories are full of the Examples of Wars undertaken, for the affronts
offered to Embafadors: And in the Sacred Story we read of a War made by King
David againft the Ammonites upon that ground. Neither can there be any caufe more
jult, as Cicero pleads against King Mithridates.

CHAP.
CHAP. XIX.

Of the Right of Burial.

1. From the same Law of Nations ariseth the Right of burying the Dead.
2. Whether so such as are notoriously wicked.
3. Whence this spring?
4. And to a the Seneca, "Burial."
5. It is due even to Enemies.

From the same Law of Nations which is voluntary, ariseth the Right of burying the bodies of the Dead. *Dion Chrysostome* amongst those Cuf tomers which he opposeth to written Laws, placeth this of Burial, next to the Rights due to Embassadors: And *Seneca* the Father, among those Laws that are unwritten, which yet are more firm and binding than those that are written, interts this of the Interment of the dead. The Hebrew Historiographers, *Philo* and *Josephus*, term this the Right of Nature; And *Isidor Pelosara*, One of the Laws of Nature: as it is very usual with them to comprehend all such Cus toms, as are common amongst all Nations, and agreeable to Natural Reason, under the Notion of the Law of Nature, as I have elsewhere shewed. And no marvel, seeing that *Aelian* speaks: The burial of the dead is a thing commanded, even by *Nature* itself. And in another place, The Earth and Graves are to all men common and alike due. *Eusebius* also reckons it among the Laws of Nature. And *Euripides*, The Laws of Mortals. *Arifides* calls it, *vivum*, A Law common to all men. *Papinius*, The Law of the whole Earth, and the general League of the World. *Tacitus*, The great Commerce of humane condition. And *Lyfias* the Orator, *The common hope of all*. He that landlords the burning of the bodies of dead men, is said in *Claudian*, to deserve himself of all humanity; and by the Emperor *Leo*, to reproach *Nature* herself: and by *Isidor*, to profane that which is holy.

And because the Ancients observed, that what Rights sooner become common to all Civilized Nations, to the end that they might be reputed the more lacred, were attributed to the Gods as their Authors; As they did the Rights of Embassadors: So we find, that they every where ascribe unto them this Right also. In one of the Tragedies of *Euripides*, and in one also of *Sophocles*, you may find it called *vivum sepulchrum*, A Divine Law: and in another, you may find it reckoned among the Laws of the Gods. And *Socrates* discouring of the Ground of which *Thefeus* made against *Creon*, brings in *Adrastos*, *having left his Army before Thebes*, and by *Cres* denied leave to bury the Dead; *supplicating* *Thefeus* then King of *Aibens*, That he would commiserate those brave men that lay unburied before Thebes, and that he would not suffer the Ancient Customs to be despised, nor that Common Right violated, which all mankind might lay claim to, *as being instituted, not by an humane, but by a divine power*: which when *Thefeus* heard, he immediately sent his Embassadors to Thebes. The same Author exceedingly blaming the *Thebans*, for preferring their own Decrees, before the Laws of the Gods. And not only the *Socrates* in this place, but *Herodotus* in his *Calliope*, *Diogenes* *Siculus* in the fourth of his Histories, *Xenophon* in the sixth of his *Grecian History*, and many other Historians, do unanimously allert: That this War of *Thefeus* was undertaken, for the Common Cause of all Mankind. And every where in all Authors of the best account, we read this office of burying the dead, commended unto us under the most specious names of the best Vertues. *Cicero* and *Lactanius* commend it as an Act of Humanity; *Valerius Maximus*, as an Act of Humanity and Courteous: *Quintilian*, as an Act of Humanity and Religion: *Seneca*, as an Act of Compassion and Humanity: *Philo* attributes it to *Pity* and Commiferation of Common Nature: *Tacitus* calls it the Commerce of Humane Condition: And *Olypias* ascribes it to *Mercy* and *Piety*: *Euripides* and *Lactanius* term it, an Act of *Justice* and of *Piety*: *Ulpian* says, *ulterior et maximum pietas officium est* Peregirinorum & pauperum *Sapiens*: To bury the Stranger and the Poor, is the last and greatest duty of *Piety*, faith *Lactanius*. As on the contrary, to deny Burial to the Dead, as the *Donatus* did the bodies of the Catholicks, *Optatus Milevitanus* condemns as Impiety. And in *Papinius* we read

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Bello
Of the Right of Burial.  BOOK II.

——Bello cogendus & Armis
In mores hominumque Creon.

——By War and Arms must Creon be
Enforce to Customs, and Humanity.

Spartiatus brands such men with Infamy, as if they had no respect or reverence at all to Humanity: And Livy calls it, A brute’s Cruelty beyond the belief of humane Anger. Homer brings in Jupiter and the rest of the Gods, as being offended at Achilles, for abusing the body of Hector. And Lactantius condemns their wisdom, as favouring too much of Impiety, who esteem all Care in burying the Dead, superfluous.

11. Whence this custom arising.

Nature, and God, and Time itself, are the best judges, whether it be permitted or no, to have the Dead embalmed. The ancient Poets say, that the best of Men are buried with the Earth; that they have their sepulchres; and that the Earth is the true sepulture of all Men, Homer.

Upon what ground this Custom of burying the bodies of the Dead, was at first introduced, whether embalmed according to the Custom of the Egyptians, or burnt according to the manner of the Grecians, or interred as we now use, which Cicero approves as the most Ancient, and after him Pliny; (who makes this different between Sepultus and Humatus, as if he were understood to be Sepultus, whose body was by any means kept and preferred; but he only to be Humatus, that was covered with Earth) it is not agreed upon, on all sides. Mosaicism attributes it to the savage Cruelty of the Giants, who were wont to devour the dead bodies of men, Cujas abolita signum est Sepultura: The abolishing of which Brutish Custom is signified by Sepultura. Others are of Opinion, that by this means men feem voluntarily to pay that debt which Nature will exact from us, though we were otherwise unwilling. For that all humane bodies being extracted from the Earth, should return to the Earth, was not said by God only unto Adam; but all both Greeks and Latines, do every where acknowledge. Cicero quotes this out of Euripides, that

Reddenda terra terra.

Earth must to Earth return.

Which also are the very words of Solomon, Eccl. 12. 7. Then shall the Dust return to the Earth as it was, and the Spirit shall return unto God that gave it. Now on this subject what said Solomon more than Euripides, who in the person of Thetis, faith thus,

Eccl. 12. 7.

Fim fuitne terra Mortus gremio tegi:
Res unde quaque sumperat primordium
Es receptum: Spiritus Celo redit,
Corpusque terra: Fort, nec enim Mancis,
Sed brevis ad eam tempus utendum datur:
Max terra repeti ipsa quod natuverat:

Now let the Dead be unto Earth bequeath’d,
And each return from whence it once receiv’d
Its being; when will the Spirit soon retire to Heaven:
The flesh to dust, from whence it came; not go’n,
But for a short time lent: that past and gone,
The Earth what it so lent, soon seeketh on.

Lactanius speaking of the Earth, faith,

She is, of All, the Womb and common Tomb.

Pliny likewise tells us, That the Earth receives us as soon as we are born; and being born, she nourisbeth us; and being brought up, she always sustains us; and at last, being forsooken by all the world, she like a tender Mother, receives us into her own Bowels again, and there hides us. Nature, faith Plato, hath ordained the Earth, as Man’s proper place, not only whilst they live, but being dead also, Ut eadem quæ primos fulcipea Natales, fulcipa et ex hac vita Exitum: That she that receives us from the womb, may, when dead, afford us a Tomb. And yet as there is nothing that is laudably done in man, but what God hath imprinted some footsteps thereof in some Beasts; so also it falls out in this very thing. Pliny reports of the Pilgrimes, That they only of all other living creatures besides men,
beauty, this we faith concerning their the given lit is. To far not to by Beasts. The like doth Virgil record of Bees:

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Excerptum testis & trixta Funera ducent.

And when the Fogs of Death have clos'd their Eyes, Their Dead to' attend with pompous Exequies.

Some are of opinion, That the first hopes of a Resurrection were by our first Parents configned to their Pofterity by this Emblem of Sepulture. So Pliny testifies of Democritus, that he taught, That men Bodies were deposited in the Earth, explicting the accomplishment of a promised Resurrection. But Christians do often refer this Custom, of their decent Interment of their Dead to their hopes of a future Resurrection. So faith Prudentius;

Quidnam sibi saxa cavata,
Quad pulchra volvunt Monumenta,
Nifs quad res creditor illis
Non mortua, sed data somno?

What means this Stately Tomb,
Thefe Solemn Obsequies,
Surely what's in its Womb
Not dead, but sleeping lies?

But the most plain and obvious reason why Burial was introduced, is, because Man being of all other creatures the noblest, it would seem a thing very unworthy, to suffer his dead body to be torn and devoured by Beasts: Therefore was Burial invented, that this Indecency might (as far as in him lies) be avoided. This is the reason given by Quinillian, in commemoration of mankind, we preserve their Bodies from the incursions of Birds and Beasts. So Cicero in his first Book of Invention, Being torn by Wild Beasts, he wanted in his Death the common Honour of Burial. And God himself threatens some wicked Kings by his Prophets, That they should be Buried with the Burial of an Ass, and that the Dogs should lick their Blood. Neither doth Laodicea give any other reason for Burials than this, We cannot suffer, faith be, the Image of God to lye as a prey to Fowls and Beasts. Nor doth St. Ambrose, whose words found thus, Nothing is more excellent than to do this office for him, who cannot require it: To defend his Body from the Beasts and from the Fowls, who is thy Companion in Nature. But, admit there were no such injuries to be feared, yet to suffer an humane Body to be cut and torn in pieces, is far beneath the dignity of humane Nature. Not much different from this is that of Sopater, To bury the dead is a very decent thing, instituted by Nature is self, left the Bodies of men after death, being naked, should be exposed to shame and reproach. And they that indige this Honour to the Bodies of the Dead, perform an office acceptable unto all, whether Gods or Semi-Gods. For it is not congruous to Reason, That the Secrets of Humane Nature should after Death be exposed to public view. And therefore hath Antiquity traduced this Custom of burying the Bodies of the Dead down even unto us, Ut Monumento condita clam & procul a conspectu tabescat; That being deposited in their Sepulchres, they may rot and mould away secretly and invisibly. The like Reason is given by Gregory Nyssen, We bury the Dead, that so what is the shame of Humane Nature may not lye exposed to the Sun. Neither is this duty of Interring the Dead, due to the person of any man, but to Humane Nature it self: And therefore it ought not to be envied to any, whether public enemies or private. As to private enemies, notable is that contest in Sophocles, concerning the burying of Ajax, where Ulysses thus bespeaks Menelaus,

After so many things th' heist wisely said,
'Takbeer, O Menelaus', wrong not the Dead.
The Reason whereof is given by Euripides thus,

To Mortal Men death is the end of strife:
For what can Rage do to him that hath no Life?

So the same Author in another of his Tragedies,

If by these Argives ye were injured,
It is revenge enough to see them dead.

And Virgil,

"Gainst Vanquished and Dead no War is made.

Which Verse being quoted by the Author to Herennius, he adds, For that which is the last and greatest of Evils is already befallen them. With whom agrees Pa-pinus,

---Bellavinius; eto:
Sed excidere odio, et stultissimis obvint iras.

---At War we were; it is confess:
But all hate's past, when wrath's by Death suppreft.

The same reason is given by Optatus Milevinus, Though your wrath were imputable whilst your Enemy lived, yet he being dead, that hatred should be appeased: For he is now silent, who haply was before licentious.

III. It is due to publick Enemies.

Wherefore it is by all confess, That this is a duty that we owe not to our private only, but our publick Enemies. This Right (faith Appian) is common in all War: It is the usual Traffick and Commerce of War, as Philo observes. So also Tacitus, Our very Enemies do not envy us Graves. This also Dion Chrysostome affirces us, That this Right is granted even to Enemies in War, though their hatreds before were irreconcilable. Lucan also treating on this Subject, faith, That Funeral Rites were observed even among Foes. Thus also doth Philo plead against Flaccus, Even to those who are slain in War, do men usually grant Burial: That they that abound in Goodness and Humanity will do it at their own charge, and others, that extend their hatred even beyond death, will yet under some condition deliver their Bodies, that they may not be deprived of the last Honour that the Custom of Nations hath decreed unto them. For what War (faith Socrates) can be so barbarous as to rob mankind of its last Honour? What enmity can preval in the remembrance of injuries done so long as to violate a Law so universally binding? Whereunto we may add that of Dion Chrysostome, For by this Law (faith he) no man can reckon the Dead amongst the number of his Enemies, nor doth any man extend his hatred and his reproaches to the Bodies of the slain. Examples whereof we may find in every Author. Hercules (we read) buried his Enemies Bodies: Alexander those whom he had slain at Ilias: Hannibal bought out the Bodies of Car. Flamininus, P. Aniius, Tiberius Gracchus, and M. Marcellus, being Romans, and gave them Honourable Funerals. The very same did the Romans to Hannibal the Carthaginian: The like did Pompey to Mithridates, Demetrius to many of his Enemies, and M. Anthony to King Archelaus. In the War which the Grecians made against the Persians, the Grecians bound themselves by an Oath made in this Form, Socios omnes se nipi; bello victoriam barbaros: All my fellow Sauidors I will bury; and if I remain conqueror in Battle, even the Barbarians. And every where in Historics we read of leave given to carry away their dead. An Example we have in Pantathias, of the Athenians, who buried the Bodies of their Enemies the Medes; and the Reafon is added, Quia quaelcumque Mortuum terra concius fuerat: Because it was always thought an All of Priety to inter all dead Bodies whatsoever they were. Wherefore according to the expostion of the Hebrew Doctors, The High Priest, though otherwise forbidden to be present at any Funerall, yet notwithstanding, if a man were found dead and unburied, he was even himself commanded to bury him. The very same was enjoined by the Pontifical Law among the Romans, as Servius notes. Christians have so high an effeem of this duty, that for this caufe, as well as for the relief of the Poor, and the redemption of Captives, they have thought it lawful to melt down their
their Consecrated Plate, and to sell it. There are also Examples that may be brought for the contrary opinion; but such as are by the Judgement of the most and best men condemned. *Hanc oro defende Fureorum, faith Virgil*; Which Servius thus expounds, *O keep me from this rage, I pray,* (i.e.) from that Malice which rageeth even after Death. The like we may read of in Claudian,

> Hominemque cruentius
> Exuit, & tenent cæsi invictis arenæ.

**Bloody are they, wanting humanity,**
> *Who to the plain, a little dust deny.*

Wherewith agrees that of *Diodorus Siculus,* Ferinum eft bellum, quod cum mortuis qui ejudem sunt Natura, geritur; *To wage War with the Dead,* who were lately of the same *Nature with our selves,* is brutifi Cruelty.

But yet as concerning such notorious Malefactors as have deserved Death, and according unto Law have suffered, there were some caufe to doubt. But that the Divine Law given to the *Hebrews,* which as it was our guide and direction to all other Virtues, so is it to this of Humanity also, did command, That such as were hanged on the Gallows, (which was a Death very ignominious among them, as appears *Numb.* 25. 4. and *Deut.* 21. 23.) should be Buried the same day. Whence *Josephus* affirms, That so great was the care that the Jews took of burials, that they took down the Bodies even of those that were publicly Executed before the Sun went down, and bequeathed them to the Earth. And as others of the *Jewish* Interpreters add, This they did in reverence only to the Image of God, whereunto Man was created. *Homer* records, That *Aegyptus,* who to the Sin of Adultery had accumulated another Sin, even that of the Kings Murder, being himself afterwards slain, was notwithstanding by *Orestes,* the Iain Kings Son, buried. Yea, and among the Romans, *Ulpian* will inform us, That the Bodies of such as were put to Death as Malefactors, could not be denied their Kinshin if they required them: yea, they were to be given to any body else that would ask them, as *Paulus* understood it. Neither did those cruel Emperors, *Dioclesian* and *Maximilian,* forbid Burial to any, though guilty of the greatest Crimes, and accordingly punished: *Hos Sepulchra erat nunc vetusius,* was the Anfwer of both of them; *We do not forbid these to be buried.* The like Culfome there was among the Romans, as *Philo* testifies against *Flaccus.* Yet Examples we have also of some who have been cast out unburied: But this is more frequently done in Civil, than in Foreign Wars. And though it be a Culfome among us to hang notorious offenders in Chains, to deter others; yet whether this be commendable or not, is much disputed, not only by Politicians but Divines. On the contrary, we find them highly commended, who have themselves caufed those Bodies to be buried, which they would not permit others to bury: As *Paulus,* King of the *Lacedamonians,* who being provoked by the *Agenor* to retaliate what the *Perseus* had before done against *Leonides,* rejected their Counfel as unworthy of him, or indeed the name of a *Grecian.* *Papinius* brings in *Theseus* bespeaking Creon thus,

> Vade, atra datasus
> Supplicia, extremitque tamen secure Sepulchri.

> Tormenta extreme, & secundus
> Vat ex Vetuss choram secure.

*Josephus* records it of the *Phœnicians,* That they gave a most sumptuous Funeral to their King *Alexander Farnæus,* notwithstanding his barbarous cruelty exercised over the Bodies of his dead Country-men. And though God hath sometimes punished some perfons with the loss of Burial, as he did *Telemachus* and *Zechariah,* yet this he did by his own most Sovereign Power which is not bound up by any Law but that only of his own Will. And whereas *David* kept the head of *Goliath,* to shew as a Monument of his Victory, it was done upon a Stranger, a contemner of the true God: And under that Law, where by the word *Neighbour* none were included but the *Hebrews* only.

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There remains yet one thing worthy our observation, concerning the Burial of the dead, namely, That the Jews, as zealous as they were for this duty, yet would not vouchsafe this Honour to those who killed themselves: And no marvell (as [some] well observes) since no other punishment can possibly be inflicted upon those who effume Death itself to be none. The Mosaic Virgins (as [others] reports) were all at once surprized with a violent fit of Melancholy, and in an honour which would needs eke, no man knowing the cause: Many of them, notwithstanding all prifonings and care taken of them, did strangle themselves, and others daily attempting to do the like, were prevented. At length, by the advice of a grave Senator, it was enacted, That all that were found hanged, should be instantly naked, and with the time cord being first dragged through the streets, hanged in the market place, and expected to publick view. That the fear of shame was stronger than the fear of death: After this Law made, none was ever found to regard it as her Honour as to attempt such an Act. Servius upon the twelfth of Virgil's [Ethec.] tells us, That it was provided by the Roman Laws, Ut qui luguer cunx sit fastet, impulsum objectover; That whosoever hanged himself should be cast out unburied. And very frequent it is among most Nations, to inflict some brand of Infamy upon such as kill themselves, as Aristotle notes, Which place Andronicus Rhadius expounding, faith, That they were prohibited Burial: Which Law Dion Chrysostome highly commends, among many others, enacted by Democritus Queen of Cyprus. At Athens, in the time of A[thenes], he that killed himself had his hand buried apart from his Body. Neither is it to the purpose to object with Homer, & other, that the Dead feel nothing, either of pain or shame. For no malefactor is put to death simply because he hath sinned, but in regard that his death strikes a terror into others. Quod mortuis accidit, a visor minenter; What happens to the dead affrights the living: and consequently, restrains them from sinning in the same kind, which is enough to justify the punishment. (Yet is it worthy to be observed, That though Plato was somewhat favourable in his Sentence on such as killed themselves, yet doth he not think fit to leave them altogether unpunished: What expiation, (faith he,) or what manner of Interest they should have that kill themselves, God knows. But then he goes on, and gives his own opinion thus, Let them be buried, faith he, in some solitary and desert place, where none was ever buried but themselves: and let there be no Statute, Monument, or Inscription set over them, that their Bodies, Names and Memories may not together.) The Platoists do excellently dispute against the Stoics, and against all such as hold, That a man may for the avoiding either of some present slav'ry, or the violent assault of some dolorous and incurable disease, courts of hopes of glory for a good cause, undergo a voluntary death, by maintaining that the Soul is to be kept in the same custody of the Body until it be unavoidably required from us by him that gave it. Much to this purpose may be read in Platonius, Olympiopolos, and Macrobius upon the Dream of Scipio. (Aristotle accounteth such as killed themselves to be weak and effeminate, Fortis eris eff maleiperepti; It is the part of a valiant man to suffer, as well as to eff courageously. Non eff virile ingeri Fortunae dare; It is but weak and lazy refuge by a voluntary death to avoid pain or shame, according to that of the Peer,

Rebus in adversis facile est contemere vitam: Fortiter ille factis, qui miser eff paeft.

Each Coward, whilest diffible, can life disdain: He valium is, who dares encounter pain.)

Brutus condemned the fact of CatO, though afterwards he wrote after the same Copy: It is neither praise nor indeed many, faith he, to turn our backs upon Fortune, and so fly away from those imminent calamities, which we should magnanimously bear. Expectandus est vitæ exitus quern natura decrevit; What manner of death Nature hath decreed for us, we must with patience expect, faith Seneca. It is no part of Valour or Fortitude to destroy our selves, but a madnes rather: Nonne furor ef, ne moriare, mori ?

It was well observed by Megasthenes, That the fact of Calanus was by the wisest among the Indians condemned; it being contrary to their Laws for any man, through impatience to kill himself. Neither did the Persians approve of it: Witness that of King Darius in Curtius, Alieno fcriere quam neci muni malo; I had rather perish by another mans crime than by mine own. No, nor the Arabians, as may be collected from that
Of the Right of Burial.

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that of Job, who wait for death, but it cometh not, and dig for it more than for hid Treas-
ures. And therefore the Hebrews do render this word [mor] To dye, by the Greek
word ἀναστάς, "To be let go, or To be dispos'd, as may appear not only by Luke 2. 29.
Lord, was lately show thy Servant depart in peace;" but by the Greek Version of that place in
Gen. 15. 2. and that in Numb. 20. towards the latter end. Which manner of Speech
is familiar among the Greeks also, as Themistius tells us of them in his Book De Anim.
They say of the Soul of him that dyeth, (faith he,) it is dispos'd, and death it self they call
ἀναστάς. A disposition. Plutarch also in his Book of Conolation, hath the same expression,
Dumæ Deus ipsius non dimitut, "Until God himself disposeth us.
It seems that the Jews did some-

what vary, in their opinions concerning this matter, as appears by Josephus, where he
records, and feem to commend the Generosity of Phylaeus, who knowing that he was
adjudged to death, (which he feared not,) scorning to fall at the command of an
Enemy (seeing that he could not kill himself with his own Sword, being bound) dath
his Head, with all the force he had, against a Stone, and so perished. Thus the Jews
plead to Petronius, as Philo records: We (say they) mix our own Bloods by voluntary deaths,
for fear lest whilst we strive at two things (i. e.) to reverence our Emperor, and yet to ob-
serve our Divine Law, we should incur the displeasure of God: Which danger we may avoid,
if by committing this miserable Life, we embrace a voluntary Death. Some of these
Jews would admit of one only cafe, wherein it was lawful for a man to kill himself,
namely, rather than live to be a perpetual reproach and scorn to the Enemies of God. For seeing the Power over our lives is not in our selves but in God, as Josephus rightly instructs his Country-men. They premise that it is the will of God that they
should put an end to that reproach by a voluntary death. And hither they refer the Examples of Samson, who seeing the True Religion in, and through him, to be held in contempt, chose rather to dye than that God by him should be dishonoured.
And that also of Saul, who fell on his own Sword, that so he might not be inflamed
by such as were Gods, and his Enemies. For the Jews held, That immediately
after the Ghost of Samuel had foretold his Death he repented, and that although he
knew he should dye in cafe he did fight; yet rather than he would betray his Country,
and the Law of God into the hands of his Enemies, he refused not to fight: Therein
meriting eternal praise by the Testimony of David. And hence it was, that he so
highly commends the men of Jofeph Gilad for their Priety, in beheading an Honourable
Interment upon Saul. A third Example we have in Razœ a Senator of Jerusalem,
in the History of the Macedoines. Infinite Examples we may find in our Ecclesiastical
Histories, of such, who left them to be enforced by Torments to abjure their Relig-
ion, have killed themselves; and of Virgins, who to preserve their Chastity, have
cast themselves into Rivers, whom notwithstanding the Church hath honoured with the
Crown of Martyrdom. St. Ambrose doth highly extol them for it; and St. Jerome
of the first of this makes a great exception of this only cafe from their general Rule.
For Persecution can justify the killing of an Enemy (faith he) but where our Friends are endan-
gered. But St. Augustine seems to be of another mind: For though he will not devo-
gate from the Authority of the Church, which haply might be let thereunto by some
Divine Tradition, or those Virgins guided by some Divine Instruct, yet, would he not have any Christian draw this into a Precedent; For (faith he) no man may presume to offer up his own Son in Sacrifice, because Abraham did it in obedience to God's express
Command: Yet this he confidently affers, That no man ought to destroy himself to avoid either
the torment of this life, lest he incur those infinitely greater in the life to come; or to prevent Sin in another, lest he contrive a worse in himself; or for Sins already past, which require a larger
time to repent of; or out of an impatient thirst after immortality, because he that is guilty of
his own death, must not expect hereafter a better life. And yet elsewhere speaking of
those who to preserve their Chastity killed themselves, he adds, Who can be so void of
humanity as not to forgive them. Among the Grecians also there was another sort of
men exempted from Burial, which suffomed the Locrians object against the Phoeceans,
saying, That it was generally observed through all Greece, that Sacrelegious persons should be cast
out unhurted. The like doth Dion Phusien's report of such as are Atheists, and no-
teriously impious. And the very famine punishment was ordained at Athens, against such
as were Traitors, as Plutarch tells us. But Nicias, in his Third Book of Alexius,
the Brother of Icte tieus, having declared the death of Icteus Conventus Crolessus, who
raided Sedition and affected the Empire, faith, That they afterward exposted his
Body to be devoured by Birds and Beasts, which was an act void of humanity, and
favouring too much of a Brutish Cruelty. But that I may retreat to what was first
intended, all ancient Writers do unanimously accord in this, That a War may be
justly undertaken for denying Burial to the dead, as may clearly appear by the fo-

1 Sam. 31. 4.  
2 Mac. 14. 37.

Dit. 
Civ. 9. 
Dit. 61. 
Dit. 1. 6.

Dit. 1. 6. 
Dit. 1. 6. 
Dit. 61. 
Dit. 9.
There are also other things, which by the voluntary Law of Nations, are due: As those things which have been long possessed, Succession to him that dyes Intestate, and such things as we hold by Contracts, though very unequal. For all these, though they have in some measure their rise from the Law of Nature, yet do they receive confirmation by Humane Laws, whether against the uncertainty of conjectures, or against some exceptions which otherwise Natural Reason may happily suggest: As we have already shewed, when we treated of the Rights of Nature.
of Punishments.

The definition and original of Punishments.
I. That they appertain to Commutative Justice, and bow.
II. It naturally belongs to no one person, but may by the Law of nature be exacted by any that have not alike offended.
III. Among men, the end of Punishment is for some benefit; but otherwise with God, and why.
IV. In what sense revenge is naturally unlawful.
V. The profit arising from Punishment three-fold.
VI. As it respects the good of the delinquent, it may naturally be exacted by any, yet with a distinction.
VII. So also as it respects the good of the person injured, and of lawful revenge, by the Law of Nations.
VIII. And also as it respects the good of every man.
IX. What the Gospel requires as to this matter.
X. The Argument drawn from the mercy of God, set forth in the Gospel, Answered.
XI. Another concerning the cutting off the opportunity of repentance, Answered.
XII. An imperfect division of punishments rejected.
XIII. It is not safe for private Christians to exact punishment, even where the Law of Nations allows it.
XIV. Or to accuse any man willingly.
XV. Or to affect capital Punishments.
XVI. Whether those humane Laws that permit the killing of a man as a Punishment, give him a right, or only impunity: except by distinction.
XVII. Internal acts not punishable by men.
XVIII. Nor such acts, as neither directly nor indirectly do hurt to humane Society: And why.
XIX. The opinion that Punishments are never to be remitted, rejected.
XX. That they may be remitted before the penal Law be past.
XXI. Yet not always.
XXII. Yes, and after the penal Law is past.
XXIII. What probable intrinsick causes justify the doing of it.
XXIV. What causes extrinsical.
XXV. The opinion that no disfemation is to be granted for any cause but what is tacitly excepted in the Law, rejected.
XXVI. Punishments inflicted for some merit.
XXVII. Where repent is had to the cause impelling, which are compared one with another.
XXVIII. As also the causes which should withdraw us, and of the degrees of the precepts of the Decalogue that concern our neighbour, and some other matters.
XXIX. Of the propriety of the offender to either, which hath divers respects.
XXX. That the merit of Punishment may extend to a greater harm than that which the offender intended: And why.
XXXI. An harmonical proportion in Punishments rejected.
XXXII. That Punishments ought to be mitigated out of Charity, unless a greater Charity forbid.
XXXIII. The facility of winning how it incites to Punishment: also reasons how it incites or dissuades from punishing.
XXXIV. Of what use clemency is in the mitigating of Punishments.
XXXV. Of what the Hebrew or Romans had respect to in Punishments, may be referred to the places above mentioned.
XXXVI. Of war made for the exalting of Punishments.
XXXVII. Whether war made for the punishment of injuries begun be just, explained by definition.
XXXVIII. Whether is be lawful for Kings or States to make war upon such as violate the Law of nature, though they have committed nothing against them or their subjects, and that jurisdiction is not necessary naturally to the exalting of Punishments.
XXXIX. The Law of nature distinguished from civil customs largely taken.
XL. And from the voluntary Divine Law not yet known to all Nations.
XLI. As to the Law of nature, that which is manifest is to be distinguished from that which is not.
XLII. Whether a War may be made for fins committed against God only.
XLIII. Of some common notions of God, which and how they are expressed in the Decalogue.
XLIV. The first infringers of these Punishable.
XLV. But not others, as is proved by the Hebrew Law.
XLVI. That War is not justly to be made upon any, only for refusing to embrace Christian Religion.
XLVII. War may justly be made against them that persecute Christians, as such.
XLVIII. But not against such Christians as do mis-understand the meaning of the Divine Law illustrated by Authorities and examples.
XLIX. But may, and that justly, against those that are impious; against such, as they believe to be Gods.

A a a Above
Of Punishments.

BOOK II.

I.
The definition of punishments.

A BOVE when we began to allign the causes of War, we considered men's deeds in a twofold respect, either as the wrong they did, might be repaired, or as it might be punished. Concerning the former we have sufficiently spoken: we come now to the latter, which is Punishments, which we shall the more accurately discuss, for as much as its Origin and nature being misunderstood, hath given occasion to many errors. Punishment in its general acceptation is, malum passuum quod injuste ob malum alicujus: the evil that we suffer for the evil that we do. And though hard labour be sometimes imposed upon some persons by way of Punishment, yet this is in respect of the pains and trouble that accompanies those works, and may therefore fitly be referred to pallion. As for those inconveniences which some men suffer without any sin committed, as by some contagious disfigure, or as being maimed, or for some uncleanliness, to be debarked the Society of men, or to be made uncapable of some office or function, (many whereof we may read of in the Jewish Law) these are not properly Punishments, though for some resemblance they have with them, and by the abuse of the word, they are so called. Among those things that natural instinct tells us are lawful and not unjust, this is one, in malum qui facit, malum ferat: that be that doth evil, should suffer evil: which Philosophers do reckon as the most antient, and most perfect rule of Justice, or as one of the Laws of Rædamanthus; yea so antient, and indubitable, that Plato was so bold as to say: That neither the Gods nor good men durst ever say otherwise, but that be that doth wrong deserves to suffer for it. Plutarch makes justice one of Gods immediate attendants, whose office it is to revive all affrons done to the Divine Law; which all men do naturally make use of against all men, as being illus Citizens. And Hierax describes justice by that which is its principal office, namely, to hurt those who have first hurt others. And Hercules calls Justice the only cure for wickedness (as if no satisfaction could be made for wrongs done but by sufferance; neither is there any thing that so powerfully restrains us from sin, as the apprehension of some future Punishment.) We are therefore very irrational, when we blame either God or men for their severity to us, when we are punished: non enim nocem discendam quia nocentes offens paen; for he is not to be blamed that puniseth, but he that deserves Punishment. (That which we suffer is just, because that which we do is unjust) Ominis paena, si injusta est, peccati penna est; Every unjust Punishment (faith St. Aug.) must necessarily refer to some crime: which is true even of those that are inflicted by God himself; though sometimes by reason of our ignorance, later calam, ubi non ius paena, the judgment flames out, when the evil is smothered.

But whether it appertain to distributive, or commutative Justice, divers men are of divers opinions. Some think that they that offend most are punished most, and so on the contrary: And because punishment is inflicted as it were by the whole on a part, therefore it is to be referred to attributive Justice. But whereas in the first place they say, that this branch of Justice takes place only where there is an equality to be alligned between terms more than two; that this holds not always true, we have already flown in the beginning of this work: Besides that they that sin most, are punished most: and they that offend least, are least punished; this falls out by consequence only, and was not primarily and of it felt intended: for that which is simply, and in the first place intended, is, that there be an equality between the offence and the punishment, whereof Horace thus: Why doth not reason weights and measures frame, That every sin may have its proper pain? —addit

Regula peccatis, quae penas irrogat aquae, Nec scutica dignum, horribili fectere flagello.

Deut. 25, 2, 3. Whereunto we may refer also that of Deut. 25, 2, 3. Where the Judge is commanded to see the malefactor beaten with a certain number of stripes, according to his crime, iniquum est, si equaliter irascatur inequalebus: to punish all sins equally is very unjust; faith Seneca: for, as the Scholia upon Horace observes; If we inflict the greatest punishments upon the smallest crimes, it must necessarily follow, that the greatest will remain either (in part) unpunished, or some new punishments must be invented. Neither is that much truer which they say, that all punishment doth proceed from the whole to its parts, as will appear by what we shall say hereafter. Besides the true intent and reason of distributive justice properly consists, neither in such an equality, nor in the procession of the whole to its parts, as we have elsewhere shewed: but in the respect had to the finnes and aptitude of the Delinquent to such a punishment, which doth not infer any right therunto strictly taken, but is only preparative as giving occasion unto it; for although he that is punished, ought to be worthy of punishment: yet may we not hence infer, that he must necessarily undergo whatsoever distributive justice may impose upon him: Neither do they that refer the punishment

II. It appertains to commutative justice.

Leflantius de lib. et c. 17.

Aug.

Sec beneath Sec. 28, 32. and Book 3, c. 11. Sect. 1.
ment of Delinquents to commutative justice, extricate themselves any better; for they consider the matter so, as if punishments were due to a malefactor in the same manner, as things are usually due upon contracts. That which deceives these men, is the vulgar manner of speaking, whereby we say that punishment is due to a malefactor, which is very improper; for he to whom any thing is properly due, hath a right against him from whom it is due. But in saying a Punishment is due unto any man, we mean only this, that it is just he should be punished: yet notwithstanding true it is, that in punishments, commutative justice is simply and by itself exercised; forasmuch as he that punished, that he may do it justly, ought to have a right to do it, which right arises from the guilt of the delinquent. And herein there is something that draws near unto the nature of contracts: Because as he that sells a thing though he mention nothing particularly, yet is premised to stand obliged to perform all things natural to the sale: So he that transgressed a Law, doth voluntarily oblige himself to the penalty of that Law, because it is not possible that there should be any hainous crime that is not punishable; so that he that is willing directly to transgress a Law, is by consequence willing to undergo the penalty of that Law: In which case, some Princes do pronounce sentence against a malefactor thus, *Ipsi te hoc pene sabedisti, thou hast voluntarily subjected thy self to this punishment. And to this purpose is that of Plato: Peccare cum seipsum, ad se panem sequestratis; whilst you make hate to sin, you do but run headlong to punishment. That woman that would marry another man is said in Tacitus, to consent to her own slavery; because that was the punishment ordained for such women. Michael Ephesius upon Aristotle tells us, That in every sin, there is a kind of giving and receiving according to the nature of contracts: for he that steals or robs one of what is mine, doth for that very thing bind himself to undergo such a punishment. And a little after, under the name of contracts, the Antients comprehended not only such as were made by mutual Agreements, but such also as were forbidden by the Laws, under such a penalty.

But yet, to whom this right of punishing offenders is due, is not by nature it self determined; this natural reason dictates, that a Malefactor may be punished, but not, who should punishe him; this only prompts us to, that it is most convenient, that it should be done by one that is his superiour: neither doth the demonstrate this to be altogether necessary, unless, by superiour, we understand him that is innocent, and that we endure the nocte beneath the degrees of men, and rank them with beafts which are subject unto men. Thus Democritus ascribes it to nature, that the better should govern the worst; and Aristotle observes, that in that order that nature hath placed every thing, that which is worser was had for the use and service of that which was better; which also holds true as well in artificial things, as in natural: The consequence whereof is, that he that is not innocent ought not to be punished by him that is at least, equally nocent (for he that fits as judge to punish Malefactors, should himself be free, not only from that particular crime, but from all others that may render him obnoxious to the same punishment) whence ariseth that of our Saviour to the Pharilees: *Let him amongst you that is without sin, cast the first stone at her; which he therefore spake, because at that time, the manners of the Jews were extremely corrupted, inomuch that they who would seem to be the greatest Saints, were observed to wallow like swine in Adulteries and such like grievous Sins; as may appear by that of the Apostle to the Romans, Rom. 2. 22. Wherefore thou art inexcusable, O man, whereso ever thou art that judgeth, for in that thou judgest another, thou condemnest thy self seeing thou that judgest, doest the same things: whereunto appertaineth that of Seneca, non possis idam autem babere fententiam, ubi qui damnandum est, damnat; that sentence can never carry any face of authority, where be that condemneth another, may as justly be condemnedom himself: for as St. Ambrose faith in the Apology of David, he that goes about to judge another, ought first to judge himself, and not rashly to condemn the errors and oversights of other men, when he daily committs far greater himself. It is very good advice that St. Ambrose gives: *Judices ille de alterius errore, qui non habet in seipsi quod condemnet, &c. Let him be judge of the errors of others, that he himself may nothing condemnable; Let him be Judge, that is not guilty of the same crimes that he denomes worthy to be condemned in another; lest whilst he judgeth another, he pronounceth sentence against himself. Let us in the first place then consider with our selves, many a triumphant and scratorial confusion, whether our own selves have not committed the like? and the regard that every man hath to his own safety will make him more moderate in passing judgment on others.

Another Question here ariseth concerning the end we propoae to our selves in punnisheing: for what we have hithereto said, amounts to no more than this, that the guilty person hath no wrong done him, in case he be punished: But from hence it doth not necessarily follow, that he must be punished; nor is it true, for both God and man, we bee do pardon many men, many offences, and are highly commended for it: for as Plato saith, and after him Seneca well observed; There is no wise man that punisheth an offender simply because he hath offended, but because he should not offend again: for what is once done cannot be recalled, but what is to come may be prevented: therefore all punishments relate to the time to come;
Of Punishments. 

BOOK II.

come; Non irae situs, sed cæver. He that punisheth is not angry, but present. Didarum in Thucydides, speaking to the Athenians concerning the Mityleneans, faith, That they bad, indeed, done very unjustly, but not so as that they should be destroyed, unless it should be found expedient. But these things are true in punishments amongst men, because we are all linked together in bonds of confanguinity; so that we should not hurt one another, unless it be for a more general good: For if one hand hurt another, faith Coffin, that which is hurt will not rise up in revenge against the other; no more should one man revenge himself upon another, unless it be for the prevention of some greater evil. They therefore that punish Malefactors with Stripes, Banishment, or Fines, do it not simply out of revenge, but in pursuance of some future good that may there- by arise: But it is otherwise in God, unto whom Plato doth misapply these Sentences. For the actions of God may be ground upon his very Right of Sovereignty, especially when they are applied to some special sins of men, although they propose to themselves no end beyond themselves: and thus do some of the Hebrews expound that of Solomon, The Lord hath made all things for himself, even the wicked for the day of wrath; that is, Even when he punisheth the wicked, he doth it for no other end, than to shew that he can punish them; (thus he is said to raise up Pharaoh, that in him his power may be known.) And although we do admit of the more vulgar Interpretation, it comes to the same sense; namely, That God is said to make all things for himself, that is, By the right of that supereminent freedom and perfection that is in himself, without seeking or regarding any thing without himself; as he is said to discharge himself, because not born of any. Certainly the Holy Scriptures do tell us that God doth sometimes inflict punishment upon some notorious Delinquents for no other reason but to shew his power. As when he is said to rejoice at their calamity, and to mock when their fear cometh, Deut. 28. 63. Isa. 1. 24. Secondly. When in revenge for former provocations, he is said to harden the heart, and to blind the eyes, and to stop the ears, as Isai. 6. 10. and thirdly. When in that last and great Good-Dehry, he adjudgeth them to eternal torments, after which there is no place or hopes of amendment, yea and some punishments even in this life that are inconspicuous, such as are obduration and excecutation, do clearly evince the truth of that which we object against Plato.

But when one punisheth another man whom Nature hath made his equal, he ought to propone some end unto himself. And this is it that the Schoolmen say, That the mind of him that avengeth an injury, should not acquiece in the sufferings of the Offender. Of the same mind also were both Plato and Seneca, Ad vivendum vivendum, non quis dixit, sed quia vitit; We should affect revenge, not as it is sweet, but as it is profitable. So likewise Aristotle, Such things are simply honest, others honest out of some necessity. And as an example of this latter, he inferts this of exacting punishments, Exequor, faith Seneca, non quia dolis, sed quia opposuit; I take revenge, not because I smart, but because it is convenient.

Thus indeed it should be with men; but for the most part it is far otherwise, for we pun- ish in revenge, and revenge to allvege the grief of our sufferings. As if tēs dolaris remedi- um inimici dolor; our pain were lessened by our enemies grief. So Cicero tells us, That grief is somewhat allied and mitigated by a just revenge. But this proceeds not from the rational, but from the irascible part of the soul, being the same with us as it is with Brutus Beasts. For anger, as in Beasts, so in men, is nothing else but namis sanguinis circa cor, ob appetitum repen- dendī doloris; An irascible heat about the heart, out of a vehement desire of revenging our own grief, as Euripides rightly defines it: which appetite is of it self so much without rea- son, that sometimes it mistakes the true object, and is carried violently against those that did no ways hurt us; as when we revenge our selves upon the young Whelps for the Bitches fake that bit us; and sometimes against things altogether without sense, as when a Dog bites the Staff or Stone wherewith he is beaten. Now what can be more irrational, quam quis irae, qua tran nec meretur, nec sentiat, Seneca, than to be angry with these things which neither deserve our anger, nor feel it? Like the Brazilians, a fierce and brutish Nation, who being wounded by a Sword, revenge themselves, as well on the Sword, as on the Man that wielded it. But this appetite in it self considered, agrees not with the rational part of the soul, whose Office it is to govern the passions; nor is it consonant to the Law of nature, because it thwart that Principle of rational and social nature, as such which forbid us to do any thing whereby another may be damned, unless it be for some greater good. But in the grief or suuerance of another, barely and in it self considered, there is nothing of good, but what is false and imaginary; as in superfluous riches, and many other things of the like na- ture. And in this sense it is not only our Christian Doctors, but the ancient Philosophers, who condemn revenge as unlawful, are to be understood. So Seneca, This word revenge, al- though it be usually taken for a thing that is just, yet it is houmene, and differs nothing from an injury, but in order only. He that retaliates his own grief upon another, hath only this to plead for his sin, That he was just provoked. Nay, if we will give credit to Maximos Tyrannus, He that revengeth, is sometimes the greater Sinner of the two; forasmuch as he that returns an injury hath more of malice, fury, and unbridled passion, than he that gave the first occasion, which is some- times done through rashness or ignorance, and against a mans will. Now if so, as it is against
Nature for the Stream to rise higher than the Fountain that feeds it; so is it most unjust that the punishment should be greater than the offence. Seeing then that it is unnaturally, nay brutishly, remedare mordentem, to injure every man that injures us: No one man either publick or private, can by the Law of Nature rightly punish another (merely as it is a punishment for what is pait) unless it be for some future benefit, either general or particular, publick or private. Dion in Plutarch, who turned the wisdom of Plato into civil acts, was of opinion, That revenge in the judgment of the Law was reckoned more just than any injury first offered; but if we look at the judgment of Nature, it springs from the very same infirmity of the mind. It is therefore contrary to the nature of man dealing with men, to appeale his own grief by occasioning another mans, barely as it is a grief. And by consequence, the leas of reason any man hath, the more vindictive he is. This Seneca observed, That Infants, Old men, and sick Men, are always more prone to anger than others. And everything that is weak and infirm, is naturally gueulous and revengeful. This also was Taucenel's Observation; 

Revenge than life it self is sweeter far, Infants for nothings, Children for trifles are Incens'd. Chrylippus was not of that mind, Nor gentle Thales; neither do I find That Socrates, who did next Neighbour live To sweet Hymentus, (though in Chains) did give Part of his Hemlock-Ionion into him, Who (being a Slave) had his Accuser been. Blest wisdom! first piece meal bids vice adieu; Then, planting truths, all errors doth fecave, To joy in those men sufferings whom we hate, Argues a mind weak, and effeminate; This, thus we gather, For in all mens delight None more than Women in revenge delight. Thus wise men define anger to be a lasting ulcer of the mind, which usually arises from the weak-mindedness of the understanding, which they probably collect from this, That fick, men are usually more angry than sound, women than men, old men than young, and they that are unfieble than they that are happy. The very same Observation we find in LaChintus, Simple, and men that are unexperienced, being provoked by an injury, are carried headlong with a blind and inconsiderate fury to revenge themselves on those that hurt them. Plain it is therefore that one man cannot be rightly punished by another, barely as such; now then let us examine what those benefits are that justify such punishments.

Hereunto then appertains that Partition of punishments that Plato gives us; and after him the Philosopher Taurus, recited by * Oedinas, which is drawn from the end or scope whereunto punishments do aim, only with this difference, That whereas Plato propofeth two ends, namely, for reformation and example; Taurus adds a third, namely, of satisfaâtion, which (as Clement Alexandrinus defines it) is the restitution of some evil done, which looks at the profit of him that requires it, which is satisfaction. Aristotle, omitting that punishment which we call exemplary, adds only this of satisfaction to that of reformation. Neither doth Plutarch omit it where he faith, That the punishments that tread on the heels of vice dost not only restrain the audaciousnes of such as offend, but do much comfort such as are injured. And this is that which the fame Aristotele attributes to that Justice, which (as I have said before) doth even the Ballance, and where he calls commutative. But these require yet a more strict disquisition. I say then that every punishment repects the good either of the peron punished, or of the peron injured, or of every man indiffinently. The first of these aims at the reformation of the peron punished, and is called by Philosophers sometimes reformation, sometimes satisfaction, and sometimes admonition. Paulus the Lawyer calls all it punishment ordained for reformation; and Plato, to teach us prudence; Plutarch, he says is Mercius, whereby he is amended and made better, as by Physick, which works contrary. For because all humane acts, especially if they be frequent and deliberate, beget a proneness in nature unto the fame, which at length turns into a habit; therefore such an act being vicious, we must as soon as we can, take away all allurements and provocations thereunto, which we cannot by any means more properly be done than by allaying the sweetnes of the sin by the sharpnes of the punishment. The Platonists, as Apuleius styleth, hold, That there is no punishment so severe as to go unpunished. And Tacitus will instruct us, That the Corruptor and the corrupted, the fiek, and the deftemperd mind, is to be reéáined with no gentler medicines than are those very lashes that inflame them. And therefore as a tender Mother imbinets the Nipple when she weans her Infant, or as a skilful Chirurgianwhat, but to remove a purulent wound, buries, and seares his Patient, whom he intends to cure; so it is the duty of a prudent 

*Aptistrate, corrorgendo modori, to reclaim and reform a Malefactor by sharp but scannable misfortunes. 

Now
VII.

Now the punishment that serves to this end, may lawfully be inflicted by any man that is prudent and judicious, and not guilty of the same or of the like fault, especially if it be verbal only, as will appear by that in Plautus.

Amicus cofigurc ob meritam noxiam
Imminis et facinus, verum in statu utile.

A Friend to chide, for what unjust appears,
Is blameles s fure; but molt, in men of years.

But if it be by stripes or any other forceable means, then is it not equally lawful for every man; yet doth not this difference between persons lawfully, or unlawfully punishing, arise from the Law of nature (rather indeed could it, but that reason peculiarly com-
mends the free exercise of this right to parents over their children, because they are so dearly affected toward them;) but from the positive Laws of men, which to preserve love among neighbours, and to prevent strife and discord, do restrain this common duty, and confine it to the nearest of kins, as appears, as well by the Codes of Justinian under this title de e-
mandatione propinquorum, as elsewhere: Apposite herunto is that of Xenophon to his Soldiers: If I shall strike any man for his good, I confess I thereby deserve a punishment; but no other than parents do from their children, or masters from their scholars: for even Physicians sometimes lance, cup, and severize their Patients, when otherwise they cannot cure them. God himself, (faith Plutarch) commands us to keep a strict hand over our children, that is, to chastise them as often as they transgress, lest by overmuch fondness and indulgence they prove unriveted, and conspire with them to themselves vicious habits. But this kind of punishment never reacheth unto death, because death takes away all hopes of reformation, unleas it be by way of reduction, whereby ne-
gatives are reduced to their opposite positives, as in that speech of our Saviours; It had been better for some that they had never been born; that is, it had been less evil for them: the like may be said of incorrigible sinners, it were better for them, that is, less evil for them to die than to live. And of such it is that Seneca meant, when he said, that sometimes it is good for them that dye, that they do dye: As when a sumbrum or impostume is grown to suppuration, better it is to burn an hole, thereby to discharge part of that imployed mass, than to run danger of it, so for a man that is past hope and desperately wicked, it is better for him, to die than to live: for as Plutarch speaks of such, they are noxious to others, but useful to themelves: So Galen when he had said, that some men ought to be punished by death; first to prevent the mischiefs they would do, were they suffered to live; next that by their death, others may be forewarned; adds in the last place, that it is expedient, even for them, to dye, being so wholly corrupted in mind and manners, that it is not possible to reclaim them. Some there are who think, that St. John Iaphe of such men, when he be said, that there was a fin unto death, 1 John 5. 16. And St. Chrysostome speaking of such, faith, that they are like men irrecoverably sick. So Justin of Constantius, seeing that there are two kinds of offences, some that are corrigible, as not extinguishing the blemish of their cure: others, of men desperately wicked, and incorrigible, for these the Laws have found out a remedy, by death, to put an end to their wickednefs, not so much for their own, as for the benefit of others. But because no arguments can be brought to prove this, but what are fallacious; therefore in very charity, we are not rashly to judge any mans case to be desperate: and therefore this kind of punishment, I mean, by death, is feldom inflicted to this end, namely, for emendation.

The benefit that accrues by punishment unto him, against whom the offence is commit-
ted, consists in, that it prevents the like mischief, either by the same perfon, or by others.

Bellus out of Taurus describes this kind of punishment thus: when the authority or dignity of the perfon against whom the offence is committed, is to be upheld and maintained, then is the punishment necessary; lest if it be unpunished, that authority be held in contempt, and the honour lost. Now what is there faid concerning authority, is also to be understood of li-

berty, or of any thing else, wherein we may claim a just right, for he that suffers one in-
jury to go unpunished, doth but invite another: wherefore Tacitus concerning one of the

Roman Emperours faid well, confederet securitas justa uliones; he might have better provided
for his own safety by a just revenge. Now to the end that a man may secur his self against
him that hath formerly injured him, there are three means:

First, By putting him to death that did the wrong; Secondly, By taking away from him the power to do wrong: Or Thirdly, By deterring him from doing any further wrong by the sharpness of his punishment, which is conjoined with reformation, whereas we have just now already discoursed. But to be secured from others, by the punishment of
him who hath offended, it is necessary that the said punishment be publick and conspicu-
ous, which appertainns to exemplary punishments, whereof more anon. Now if our de-

fire of revenge though private, be directed to these ends only, and can be impaled with
of the bounds of equity: if we look at the bare Law of nature first abstracted from divine and humane Laws, and from those other occurrences which do not necessarily happen to the thing; it is not un lawful, whether it be done by the person injured, or by another, seeing it is natural for one man to help another. In which sense may that of Cicero be admitted, where he defines the Law of nature to be that which consuits not in opinion or custom, but in that which nature itself suggests unto us; where also amongst other examples, he places the sin of vindication, which he there opposeth to grace or pardon. And if any man should question the extent of the word, he defines it to be, that whereby we defend both our selves, and those who ought to be dear unto us, from force and calumny by just revenge, or whereby we punish offences. Mithridates in that Oration wherein Justin extracts out of Trogus, speaks thus: Against Thucius all men ought to draw their swords, if not for their safety, yet for their revenge; which Plutarch in the life of Aratus calls "enous enosos, the law of revenge." By this natural Law Sampson justifies himself against the Philistines, when they had provoked him by taking away his wife, and giving her to another: Now (faith he) shall I be more blamed than they, though I do them a displeasure: for he concluded it to be just for him to injure them, who had first provoked him by so great an injury; and according to this rule he pleads his own cause and defends himself: for being demanded by the men of Judah what he had done against the Philistines to provoke them; he answered, as they have done to me, to have done to them. When the Lawrenceines delivered up that killed Tattus to Romulus to be punished, he set them at liberty, saying, that blood was to be expiated with blood; intimating that because Tattus had before lain their Embassadors, or at least connived at it; it was but just that blood should have blood: for as Beliarus in Propoecotus notes, it is but natural to account him as mine enemy, who hath by an affright wounded me. Thus likewise the Plateans in Thucydides plead for themselves in the like case: we have deservedly punished them, say they; for by that Law that is in force among all men, it is lawful to be revenged on those that first make war upon us. Demosthenes in his Oration against Aristocrates, that this Law is common amongst all men to inform satisfaction from them that have forcibly taken away our goods from us: and Jugurtha in Salut having shewed how Adravus had laid in wait for his life, adds, that the people of Rome, did that which was neither just nor right, in forbidding him that right which the Law of Nations allowed him; that is, a just revenge: and Aristides the Orator proves it by the authorities both of Poets, Lawyers, Proverbs, and Orators; that a revenge may be lawfully taken, upon such as have first injured us. St. Ambrose commends the Maccabees for revenging the blood of their innocent Brethren, though it were on the Sabbath; and against the Jews, who bitterly complained against the Chriftians, for burning their Churches, he pleads thus: if I should argue according to the Law of Nations, I should recount how many Christian Churches the Jews burnt in the time of the Emperor Julian: thereby concluding, that to require like for like was agreeable to the Law of Nations: thus did Jonathan, and his associates revive the death of their Brother John upon the Nabathites, as they were celebrating some great Nuptials, upon whom he expected fell, and slew both men, women, and children, as Josephus informs us. But because men are too partial Judges in their own causes; therefore that liberty, which nature did at first indlude unto every man in vindicating his own quarrel, is justly taken away; and Judges appointed to determine all controversies between man and man, and to help those to right, who suffer wrong. Thus Demosthenes pleads against Conon: As for these injuries, it was thought fit by our ancestors, that they should receive their punishment from the Laws, and not from the rage and violence of every man will. So doth Quintilian, the compensating of an injury is not only repugnant to the Law, but unto peace; for there are Laws, Judges, and Courts whereunto any man may appeal, unless here be any that are ashamed to be vindicated by the Law. So likewise the Emperours Hadrian, and Theodosius: for this very cause are Tribunals erected, and the defence of the public Laws institufed, lest any man should arrogate to himself the liberty to revenge his own quirrel. To King Theodoric; from hence do the Laws challenge from us a sacred reversion, that no revenge may be taken by our own hand, nor any thing done against our enemies, by the juddian infu- lice of our own passions. For how inconvenient this would be, is evident by that plea of Tullius against Orestes:

This, if thou sufferest, Menelaus, I ask, If the angry wife her husband's blood should spill; And in revenge, the son his Mother kill: And if her blood cannot be washed away, Without fresh blood, where would these mischief's stay?

Which words of Euripides, being full of Prudence, do abundantly supply both Philosophers and Orators with matter of Argument. Maximus Tyrius in his dissertations concerning the retaliating of injuries speaks thus: A good man will neither do an injury nor suffer
suffer one; not do one, I mean, willingly; nor suffer one, because he magnanimously fights all that are done into him: if to infer an injury be wicked, surely to return one is somewhat like it; for although he that wrongs another, in that he gives the first offence, commits the greater fault; yet he that requires that injury, because he was pleased with revenge, is able wicked: if for he that doth his neighbour wrong, do evil; surely, he that returns that evil, is not the leas evil, because he doth it in revenge. And a little alter, quis erit unquam injustam finis, &c. if it be granted, faith he, that a good man having received an injury may revenge it, then may he that suffers that revenge, as justly return it; for on both sides, the equity of doing the same thing is alike: wherefore he cries out, qualem, O Jupiter, injusta fecit! what manner of justice is this, that thou hast made? O Jupiter, that must necessarily arise of injustice: quoniam progriditur malum, & ubi tandem confestit? how far shall this evil proceed, and whereat it at length? thus likewise doth Aristides argue in his Oration for peace; who of all the Grecians would be left alive, if to revenge the death of those who are already slain, those yet living should wilfully run upon their own ruins? For prevention of which inevitable mischief, wree (as I have already said) Laws instituted, Tribunals erected, and Magistrates ordained; yet doth this liberty, that nature gave us at the first, remain still in force in such places where no Laws are, or can be executed, as on the S:as and in desert places; yea, and in divers Nations, especially amongst the antient Germans, where almost all differences were ended by the Sword; as appears by that of King Theoderick in Caffidore to his Goths: Break off (faith he) this prodigious custom of single combats, where matters in difference are much better defended with words than blows; and in another place, what need have we of tongues, if every sight quarrel must be ended by the Sword? whither (happily) we may refer that act of Cajai Cesar, who being then a private person, did with a tumulurious Fleet pursue and chase certain Pyrates by whom he had been formerly taken, dispering some of their Ships and sinking others; and when he found the Proconful negligent in punishing the Captives whom he had taken, he himself returned to the Sea and commanded them to be hanged: so likewise is it among the Umbrians, where every man is his own Judge and avenger, which at this present is usually practised among the Mulcivates, and without any restraint in some small time after their address in vain made to the Judges: from whence also before Christian Religion was planted, sprung the custom of Duels among the Germans, which is not yet utterly abolished. Wherefore the Germans in Paterculus, admired when they observed the form of the Roman Jurisprudic, whereby all contentions and injuries were decided in a judicial way; and that which was usually before determined by force of Arms, was now decided by Law: the Hebrew Law permitted the kinman of him that was murdered to kill the murderer with his own hand, in case he overtook him without the Cities of refuge. And it is well observed by the Hebrew Doctors, that a kinman might exact the Law of retaliation with his own hand for the person killed; but for himself, if any violence was offered him, either by wounds, mutilation, or otherwise, he was to make his appeal to the Judges; because it is a very difficult thing to moderate our passions, when they are excited by our own personal grief. The like custom of taking private revenge for murther we find to have been among the antient Greeks, as Homer testifies; but examples of this kind are much more frequent among such as have no common Judge to decide controversies: whence it is, that just wars are defined to be those, whereby injuries received are avenged: And Plato doth so long approve of contentions by war, until the person injuring shall be enforced to give unto the person injured just satisfaction.

The profit that every man indefinitely may receive by the punishment of a Malefactor, which is the third end why they are punished, hath as many parts as that which the injured person receives by it: for he is lo punished, either left he hath injured one, should injure another; which may be prevented, either by his death, or by disabling him from doing the like injury, as by imprisoning him; or secondly, by reclaiming him; or thirdly, leaving others being encouraged by the hopes of impunity, should be alike injurious unto others, which is the end of all publick punishments which are therefore used, ut minus pana metus fit multitum; that the punishment of one, might strike a terror into many: Or (as Demosthenes speaks) that others may learn wildom and fear. Polybius records that he saw some Lymy crucified for attempting the life of a man, that so the rest for fear of the like punishment, might be affrighted from committing the like crime. Now the power of executing this right also is naturally in every man: thus Plutarch tells us, that nature doth design a good man to be a perpetual Magistrate; for that man that is eminently just and honest, is by nature raised up and qualified for a Prince, as the fame Plutarch speaks of Philopomen, that he took upon himself the defence of the Citizens, who also, without regard to their Laws and times of their Elections, followed him by the bare instinct of nature which always intends the best to govern the worst: Thus Chrysostome speaks of Moses, that before he led out the people by his hand, he declared himself to be their captain by his deeds; it was sufficiently demanded by the Hebrew, who made thee a ruler? ut factis, &c. de nomine facti controversiam; thou seft his deeds, and dost thou well then to enuie about names? as if a patient being first cut, and so cured of
Chap.

Of

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fome defperate Difeafe, (liould cavil with his Phyftc'ian, and demand of him, Who made him a Phyfcian, or who gave him authority to cut him ? To whom the Phyfician might very well anfwer, Ars
mea
Morbus tuus j *JMy friend, it was my skill and thy Difeaff that made me to cut thee.
So might Mofes have anfwered, It was thy cruelty and manifefl injuftice that made me a Judge
and a Ruler. To govern well is not a dignity only, but an art, nay the greateft of arts.
Sapiens nmquam prtvatus eft,
wife man u never a private man, as Cicero proves by the example of Nafica. Neither is he unim anniConful, a Magijtrate for one year only, us Horace
lpeaks of Lolhus.
Yet notwithftanding is not this liberty to be exercifed in any place, but
where the Laws of the Commonwealth do permit it. For thefe natural qualifications (as
Concerning this
I have often faid) infer no right, though they give us a capacity for it.
natural Right the opinion of Democritm was this, Concerning the killing or not killing of living
Creatures, the matter ft andsthm, If thofe Creatures either do or would hurt us, whofocver kills
them fhall be innocent ; nay, he that kills them, doth much better than he that fpares them. And
prefently after he faith, As for thofe Beafts which unjaftly annoy m, it is altogether lawful for
m to kill them all. And furely it is not improbable that good men before the Flood did
live much after this manner, before God had declared his will of converting the reft of
the Beads to ferve a Mans nourilhment.
And by and by he addes, What we have written
WhereuntO he
of Foxes and other noxious Serpents, the fame we fuppofc maybe faid of men.
prefently fubjoins, Fitrem& Latronemquiquocunquemodoocciderit, fivemanu, five jujfu, five
fuffragio, innocens eft ; He that kills a Thief or a Murtherer, whether it be with his hand, or by
his command or fuffrage, is to be accounted innocent.
And to thefe places of Democritm, I
fuppofe Seneca had fome refpecl: in faying , When 1 command an obftinate Malefactor to be Stn.de in I. i»
put to death, I do it with the fame mind and intent as when I command a noifom and venemous
Nay, if I fee a Viper or a Scorpion (faith Philo) though he attempt not to
Beafi to be killed.
bite or to wound me, yet will I kill him if I can, left he fliould endanger me or fome others, by that
malignity that is in him.
We would not kill Foxes, Wolves, and the like ravenous 'Beafts, could
We but make them tame and ferviceable, and not be endangered by them ; fo, Ne homini quidetn
nocebimusquiapeccavit, fed ne peccet, Neither would we hurt and deftroy men becaufe they
have offended, but becaufe they fhould not offend again. But fince as well the ftricl: enquiry
into the nature and quality of every Faci doth often require great diligence, as alfo the
fitting of each crime with its juft punifhment, much prudence and equity, left whilfteve»
ry man prefuming on his own fufficiency fhould arrogate more unto himfelf than others
would be content to grant him, and thereby much ftrife and contention fhould arife therefore it was unanimoufly agreed upon, That in all juft Societies of Men, fuch fliould be
made choice of as they efteemed to be the belt and molt prudent amongft them, or at
Jeaft whom they hoped might in time prove to be fo ; whom they called Magiftrates, up-.
on whom, by common confent, they transferred all that right which (by the Law of Nature) every one of them had to punifh Malefactors.
So the fame Democritm, The Laws
would never reftrain
from living as we pleafe, but that it was evident that men went about to
wrong one another: For envy is the mother of fedition. But yet what is faid before of private
revenge, the fame may be here alfo faid of publick and exemplary Judgments, namely,
That there doth yet remain fome footfteps of that ancient Right in fuch places, and among fuch perfons as are not fubject to publick Judicatories ; yea and among fuch alfo as
are fo fubjett in fome particular Cafes.
As among the Jews it was lawful for any man to
kill hiai immediately who forfook God and his Law, or that feduced his Brother to Ido- Dent. 13. o.
latry, which the Jews called the judgment of zeal which was firft exercifed by Phineas, Numb.25.

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and from him was drawn into a cuftome. Thus Mattathias and his five Sons fell upon a * Macc< 2 2 4s
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certain Jew, who, in obedience to the Kings Command, was facrificing unto the Heathenifh Gods on the Altar at Modin, and flew him, as Jofephm informs us.
So we read of Ant.L12.c4.
three hundred Jews which were killed by their own Countrymen, in that Book which is 1 Mace. 2. 24,
vulgarly called the third Book of the Maccabees.
This was the fole pretence that the
Jews made for their ftoning of S l Steven, Alls 7. 57. And for their confpiracy againft S*
Paul, Alls 23. many other examples we may find in Jofephm, and in Philo, who in his
Book of Sacrificers to Idols faith, That fuch a man as fhall fo facrifice, fhould be puniflied at Ch.20.Seft.ja publick^ enemy to all n.en, be he never fo nearly related unto us.
And his Motives and Arguments whereby he would perfwade m to a defection from the true worjhip of God, are to be publifhed unto all that love true piety, that all men may immediately run from all places to take revenge upon that impious Wretch, being fully perfwaded that the defire to kill fuch a man is an
holy thing.
Yea and in many Nations, this Right doth yet remain in Matters over their Servants, and in Parents over their Children, to punifh them even with death.
So it was
lawful for the Ephori of Sparta to put to death any of their Citizens without judgment.
Now from what hath here been faid we may clearly underftand what the Law of Nature
was concerning punifhments, and how long it continued.
Let us now enquire whether this liberty of punifhing or revengingan injury be reftrained
X.
bytheGofpel. And furely it is no wonder, as we have eifewhere laid, that many things
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that are consonant to the Law of Nature, and to the Civil Laws, are notwithstanding forbidden by the Divine Law, seeing that that Law is the most perfect of all Laws, and propo-
seth a reward far greater than humane nature, or than can possibly be given by any other Law-maker; for the obtaining whereof there are deliveredly required such Vertues as ex-
ced those commanded by the Iole Law of Nature. Tho' Chastisements that leave be-
hind no brand of infamous or lastimg damage, and are necessary for certain Ages and Conditions, as for Children and Servants; are no whit repugnant to the Divine Evangelical Law, especially if done by such as by humane Laws have a permission so to do, as by Parents, Tutors, Maters, &c. which may easily be collected from the very nature of the thing it self. For these are the Souls Physick, altogether as harmless as well-tempered Potions, though to the fende as unwelcome. But as to revenge it is otherwife: For as it only satisfies the mind that is sensible of the wrong it suffers, it is naturally unlawful, much lefs is it agreeable to this Evangelical Law, as we have already shewed. But the Hebrew Law did not only forbid to hate or bear any grudge against their Brethren, (that is, against their own Country-men) Lev. 19. 17. but it commanded them to confer on them some common courtesies, though they were their enemies, Exod. 23. 4. 5. Now our Saviour embowelling this Law, and throwing, That under the name of Neighbour all mankind was to be underfoot, doth hereby convince us, That we are not only restrained from hurting our enemies, but that we are also commanded to do them good, Matth. 5. 44. But yet it was permitted to the Hebrews to revenge some great injuries done them, though not by themselves, yet by their Judges. But the Evangelical Law takes away this licence also, as is evident by that opposition that he puts between the Law and the Gospel, Te have heard that it hath been said, An eye for an eye, and a tooth for a tooth, faith Christ; but I fay unto you, &c. And although the words following do properly appertain to the repel-
ing of injuries, which licence they do at least in some measure restrict; yet much more may we think their purpose was to prohibit revenge, because they seem to be placed in direct opposition to that permission which was actually given them, and so to imply a rejection of that licence, as being agreeable only to Moses's more imperfect Discipline: Not that a just revenge was evil, but that Christian patience was much better. This revenge by way of retaliation, St Augustine calls the justice of the unrighteous. Not that the ven-
enance which the Law decrees is unjust, but that our thirst after revenge is sinful, which better be-
s a Judge to order, than a wife male to exact for his own satisfaction only. Concerning which matter, thus speaks Tertullian, God by the Prophet Zachary commands thus, Let no man be mindful of, or remember an injury done him by his Brother, Zach. 7. 10. and not by his Bre-
ter only, but by his Neighbour also, as appears by another charge given by the same Prophet, Zach. 8. 17. Let no man imagine evil against his neighbour, no not in his heart. Whence Ter-
tullian infers, Multo magis patientiam indixit injurias, qui indixit oblivionem; He that com-
mands us to forget injuries, doth much more command us to bear them patiently; and be that 
clearly the heart from thinking evil; doth much more restrain the hands from doing evil: and 
when he faith, Vengeance is mine, I will repay it, what doth he but teach us, That we 
should wait with patience, till God (whoso Prerogative it is to revenge,) will be pleased to take our 
Curfe into his own hand? And seeing that he will not permit us so much as to remember injuries, 
or to imagine evil in our hearts against our Neighbour, it is plain, That he doth not require that we 
should exact an eye instead of an eye, or a tooth instead of a tooth, by way of revenge; 
but rather by permitting the second injury, his main scope was to repress the first. Ut unul-
quique recipiens licentiam fecundae injuriae, a prima remedium continetur; That every 
man considering with himself, that whatsoever he doth unto others, he must suffer the like from oth-
ers, may be the more fearful of doing that wrong which he would not be content to suffer. For 
The Argument, as to men, was more forcible to restrain us from doing violence, by setting 
before us the Law of counter-passion, than by affying us that he himself would avenge it. 
And yet both these flaming swords are set to restrain us from doing wrong, Ut qui Deo cre-
deret, uterum à Deo expectaret; qui minus fideret, Leges talionis timeter: That he 
who believes that God is the Avenger, might fear to offend, left God should avenge it; and he 
who believes not, might yet be afraid of the Laws of men, when he assuredly knew, That what 
wrong forever he did unto his neighbour, he should undoubtedy suffer either from him or others. 
Our Saviour's Precept then of suffering injuries patiently, and of forbearing revenge, is not inconsistent with the Discipline of Moles, but rather strengthens and confirms it. And indeed if we look at 
the reason of this so perfect and exact patience that is required of us, we shall find that there 
would be but little of equity in the Precept, if it did not proceed from him who is the righteous 
Judge of the whole Earth, and who hath engaged himself by his word and promise, That he himself 
will revenge our wrongs. For if he that imploeth on me this grievous burden, of not only not returning a 
blow that is given me, but of offering mine other cheek, to the Smiter, and of not only not returning re-
proaches for reproaches, but of blessing those that curse me; if, I say, he that restrained me thus from 
righting myself, do not right me, in vain doth he command me patience, if he give me not the reward 
of that patience which is a just revenge, which he ought to permit to me, if he do not himself; and
and if he suffer not me to do it, be himself it bound to perform it. For Discipline intereft in-
juriam vindicari; It is a necessary part of good Discipline to help them to right that suffer wrong.
And mens ultimis, omnis resenatur iniquitas; the fear of a just revenge refrains all acts of
violence. By this of Tertullian we may fee, That it is not only unlawful for a Christian to ex-
tact this Law of retaliation, but that it was not tolerated among the Hebrews as a thing
shyly, and in it self commendable, but only for the prevention of a greater evil. Thus also doth St. Chrysostome expound that Law of retaliation, Therefore doth Christ urge that of
Moses, An eye for an eye, and a tooth for a tooth, Ut ilius manus cohebat, non ut tu exci-
cit contra; To refrain him that offers the wrong, not to provoke thee to revenge who suffereth it;
not only to preserve Thine eye, but to keep His also safe. That it is not lawful for a Christian to
exact this Law out of hatred, nor barely as a punishment for that which is past, is without
all question. The most learned among the Hebrews did not apprehend it in that latitude;
for they respected not so much the words of the Law, as the reason of it, and the intent
of the Law-giver. This appears by the acknowledgment of the Jews of Alexandria, (as
Philo tells the Story) when they when they beheld the calamities that befell Flaccus, who was
their bitter enemy, cried out, Non deleatamur, Domine, utione de unmiro, &c. We delight not,
O Lord, in revenge, though on our enemy; for from the Sacred Laws we have learned to con-
side the man. And to that end is that general Precept of our Saviour, To forgive every man
(without distinction) that hath offended us; that is, Neither to do, nor to with them any
evil, out of the fene of that evil which they have done unto us; for he that does so is
cruel, arrogating that unto himself which is due unto the Laws: wherefore LaGratius reciting
those words of Cicero, Itur bonus eft qui prodet quibus poffit, nocet nemini, nisi facetius in-
juari, He is a good man that doth good to whomsoever he can, but hurt not none, unless provoked by
some injury; thus defects upon them, O what a plain and excellent Sentence is here spoiled
by the addition of two words! And St. Ambrose, reciting the fame Sentence of Cicero, faith,
That that Sentence wanted the authority of the holy Gofpel to confirm it, (which teach-
eath us, That to return an injury hath no lefs of evil than to infer one.) But what shall we
say of that revenge which respects not the time past, but that which is to come? Surely
Christ fays we to forgive even this alfo, firft in cafe there appear any signs of re-
terience in the perfon offending, Luke 17. 3. And a plenary remission the Apostle requires,
Ephes. 4. 32. that is, Such a remifion as refhores the Offender into the fame degree of
friendship wherein he was before the fin was committed; whence it follows, That nothing
ought to be exacted from him by way of punishment. Besides, though there be no fuch
signs of repentance, yet if the damage we fuftain be not very great, no greater than the
lofs of ones Coat, Christ by this Precept restrains us from requiring any revenge at all.
Of the fame opinion were both Plato and Maximus Tyrus: The like doth Mufonius profes
himself of, namely, That for small reproaches (as a box on the ear, &c.) he would
neither fine any man at the Law, nor perfwade any man to do; because fuch as thefe are
much better forgiven or diftembled. But in cafe we cannot paft it by without giving en-
couragement to greater injuries, either to our felves or others; then we may provide for
our own safety, yet with the smallest damage we can to him that hath provoked us. For
even the Jews themselves (as Jofephus tells us) befoie the cofls and charges of the hurt
done, whereof we have a diftincl Law, Exod. 21. 19 did usually buy off their Tails with a
Summ of Money. The like they did at Rome, as Favorinus in Gelinus tells us. So Jofeph
the fober Father of Jefus, believing his Wife to be with child by adultery, chose rather to
dismiss her privately, than to expofe her to shame; and this he is faid to do, because he
was a juft man, that is, as St. Ambrose expounds it, A man free not only from the crueltv
of revenge, but from the fervency of an accumtation; for as LaGratius had before faid, A
good man ought not to acce{se any man of a crime that is capital. Thus Jofep Whitaker con-
cerning thofe that bitterly accufed Christians, We, faith he, would not have them punished; for
they are sufficiently miferable in their own wickednefs, and in their ignorance of what is good.
Lafly, thofe punishments that are executed, not for any private, but for the public
good according to the order of things, by their guilt or theft, to deter others, or to prevent fu-
ture milchiefs; are not forbidden by Christ, as we have elsewhere proved by a moft irre-
fragable Argument: feeing that when he gave thofe Precepts, he gave also this Testimony of
himself, That he destroyed no tittle of the Law. But the Law of Moses, which in
thefe things was certainly in force fo long as the Jews had a Commonwealth, did perfe-
rantly join the Magistrate to punish Capital Offenders with death. And if Christ's
Precepts could conflict with Moses's Law, as it exacted punishments, even fuch as were
capital; certainly they may confide as well with thofe humane Laws, which, in imitation
of the Divine Law, do require and inflict the fame punishments to the fame end. Jofep-
hus highly extols the Pharifees for their clemency and moderation in punishments, whenever
arife fo many exceptions in their Laws concerning public punishments; and this alfo a-
mong others. That though the Offender muft certainly be put to death, yet was the man-
ner of his death to be gentle, and with the leaft of torments.
Yet some there are, who in defence of the contrary opinion, do thus plead; that God especially in the new Covenant, doth declare himself to be full of mercy and forbearance, which all Christian men, yea even Magistrates, as Gods vicegerents ought to imitate; which I grant to be in some measure true; but not in that large and unlimited sense as they would have it understood. For that infinite mercy of God declared in the New Covenant, doth principally respect those sins which are committed against the Laws given to Adam and the sons of Noah, or against those Laws given by Moses before the publication of the Gospel, as will appear, *Aii. 17. 36. Rom. 2. 25. Aii. 13. 38. Heb. 9. 15.* For those that are committed after, especially if attended with contumacy and stubbornness, are threatened with judgments of another nature, much more severe than those threatened by Moses, as *Heb. 10. 29. Matt. 5. 21, 22, 28.* Neither are they threatened with judgments of the other life only, but very often with judgments of this life, as *1 Cor. 11. 30.* Neither doth he at any time indulge pardon to a sinner, *nisi ipse de se quasi potas exigeret; unless he that sins, do as it were inflect punishment upon himself,* 1 Cor. 11. 3. And that with a great deal of sorrow, 2 Cor. 11. 27. But here they farther object, that in imitation of Almighty God, the Magistrate should not punish those at least that are penitent. But to pass by that, it will be a difficult thing for the Magistrate to discern who are truly penitent; for if outward show and professions of penitence would be sufficient, no man would smart for his sin; we find by the example of King *David,* that God doth not always remit all kinds of punishment, *no not to the penitent:* for though he do remit or abate of the severity of the Law, so that he doth not punish him with a violent, or otherwise untimely death, whereunto his sin hath subjected him; yet whilst he suffereth him to be chastised with the rods of men, it plainly shews that his mercy is as well seen in the extenuation of punishments, as in the total and absolute remission of them; *there is much of mercy and leniency in the mitigation of torments,* and less judgments deserve not the name of judgments, when we knew that we have deferred greater; *even so,* now God may and undoubtedly doth express his mercy to a sinner, in remitting the punishment of eternal death, which every sinner doth contract for his sin, though he do visit him with an untimely death, either immediately by himself, or mediate by the hand of the Magistrate.

But others there are again that urge, that together with the life of a sinner all opportunity of repentance is quite cut off: whereunto we answer, that no man is so dully snatched away, but he is allotted a certain time to make his peace with God: And although he be not permitted to make a real expression of his conversion, by his life and conversation; yet that God doth sometimes accept of the will for the deed in such cases, is most apparent by the example of the Thief upon the Cross. And if it be yet objected, That a longer life might happily conduct much to the glory of God, in the perfecting of this work of repentance in him: We answer, That God haply might as probably have received as much dishonour in his recidivation, or falling back to his accursed wicked courses; and so that of Seneca might very fitly be applied, *Quod non homo hominibus superest,* representation tabidus, mortem; that only good thing that thou art capable of, we represent unto thee, which is death. And that all of the same Seneca, *Nemo modo profat, defuntque malis*; there being no way left for them to cease to sin, but to cease to live; whereunto we may add, that which the same Author faith elsewhere, *Tabitus ingenios sit exaudire remedium eis,* optimaque eis abire eis qui ad se magnum reverternus eis; death is to such the only remedy, it being left for him to dye, that lives without any hopes of being cured. Let these therefore together with what we have said in the beginning of this work, suffice for answer to those who hold that either all punishments, or at least such as are capital, are without any exceptions, prohibited unto Christians; the contrary whereunto we are taught by the Apostle, who within the duty of a King includes the power of the Sword, as being the Executioner of divine vengeance: and in another place he tells us, that we ought to pray that Kings may be made Christians, and that as Kings, they may protect the innocent; which in this general corruption and depravity of mankind, even since the times of the Gospel, cannot be done, unless by the death of some, the impudence of others be repressed; feeling that all the publick punishments that are very where inflicted upon the guilty, are not as yet found sufficient to guard or protect the innocent. Neither is it altogether impertinent, to propose unto all Christian Magistrates the example of Sabacon King of *Egypt* for their imitation, a man highly famed for his Piety, by whom all capital punishments were changed into some servile works, that were profitable to the Common-wealth, and that with good success, as Diodorus testifieth: *Strabo* relates the like of some Nations inhabiting about Mount *Caucusus,* where, faith he, *They put no man to death although they offend never so highly:* yea and among the Romans, no Citizen was ever known to be put to death or punished with stripes after the Porcian Law was made, unless for Treason, or being first condemned by the people of *Rome.* Neither is that of Quintilian to be sighted, *No man will doubt, faith he, but that if a Malefactor could be reclaimed, and become a new man, as some such there may sometimes be, it were better for the Common-wealth that he should live*
It is observed by Balsam, that those Roman-Laws which condemned men to death, were most of them changed by the Christian Emperors into some smart punishment, whereby both the condemned Party was more sharply urged to repentance, and others more affrighted by their laiting punishment. Nicerius records it, That during the Reign of Johannes Comnenus, no Malefactor was at any time put to death. And when some ranting Donatists had killed two Catholic Priests, most barbarously putting out the eyes, and cutting off the fingers of one of them, St. Augustine befought Count Marcelius not to punish them by that strict Rule of retaliation, whereby they should suffer according to what they had done; but that he would suffer them to live, and to enjoy their limbs: yet to restrain them from the like outrages by some hard, yet profitable, labour; or to reclaim them from their madness by some smarting punishment. For this also, faith he, is called a condemnation. And who understands not this to be as well a benefit as a punishment, whereby neither are the Reins let loose to licentious cruelty, nor that wholesome Fyshick withheld, that should work, Malefactors to repentance? (An Houle of correction strikes more terror to an idle Rogue, than the Gallows; and to be chained to an Oar, than Death it self.)

By that Division which we have made of the ends for which punishments were ordained, it seems that somewhat was omitted by the Philosopher Taurus, out of whom Gellius faith thus, Whenever there shall appear in Malefactor great hopes of reformation without punishment, or no hopes at all of his amendment, or that there is no necessary cause to fear the dignity of the Person against whom the offence is committed, should be flighted or contemned, or that the sin is not so as requires the impression of some necessary fear to preserve others from it; then wherein forever it is that men offend, it is not worth our study to inflict punishments. For he seems thence to infer, That punishments are needless, if any one of these ends be wanting; whereas on the contrary all these ends must cease, that there be no need of punishments. Besides, he omits this end, namely, When an incorrigible Sinner is taken away, to the end that he may not commit more or greater sins. And what he there said concerning the loss of the dignity of the perfon against whom the sin is committed, was to be extended to other damages, which we may have just occasion to fear. Much better is that Partition which Seneca makes, In revenging injuries (faith he) the Law looks at three things, which every Magistrate ought likewise to pursue: namely, That either be whom we punish should amend his life; or that by his punishment others should be mitigated; or that inconsiderable Malefactors being taken away, that they are innocent should live more securely. The two former of these Plato commemorates, Punishment oftimes corrects and amends a Malefactor; but if this fail, it doth certainly mitigate those that come to the knowledge thereof. For many men are inflamed by other men's harms, and grow more watchful over themselves by fear of the like sufferings. But in that Division of Seneca, if by those that are innocent, we understand as well those who may hereafter be injured, as those who have already been injured, we have a full and perfect Partition; especially if to those two words, taken away, we add or suppress. For both exile, imprisonment, and whatsoever else is whereby a man is disabled to do wrong, may be hither referred. But that distribution which Seneca elsewhere makes, is more imperfect, where he faith, That in punishments this Rule is to be observed, That some are infallibly to reclaim those that are wicked, others to take them away. And yet that of Quintilian is yet more imperfect, That every punishment appertain not so much to the sin, as for example.

From what hath been already said, we may collect how unsafe it is for a Christian, being a private man, to take revenge upon any wicked man, especially by death, either for his own or for the publick good; although it be sometimes permitted by the Law of Nations, as we have already declared. And therefore it is a laudable custom among some people, for such as have the supreme power to grant Commiions to such as put out to Sea to perfect Pirates wherever they find them, whereof they may make use as occasions serve, to thew (if need be) that they did it not upon any private malice, but in obedience to their Princes Commands.

Not much unlike unto this is another custom which I find in some Countries, where every man that will, is not permitted to prefer a Criminal Accusation against another; but some particular men are chosen, and thereunto commissioned by publick Authority: so that no private man can attempt any thing that tends to the effusion of human blood, but such only as are bound to do it by virtue of their Office. And to this hath the Canon of the Eliberine Council respect, which denies the Commission to any man that shall by his private fuggeltion or accusation, occasion the death or protraction of another.

And from what hath been already said, we may collect also how unsafe and indecent it is for a man truly Christian, rashly to thrust himself into such publick Offices as to have it in their power to sentence men to death, or to conceive and publish himself to be fitted that such a right of life and death should be committed unto him, as to the most excellent of all others, and as unto a God amongst men. For surely our Blesed Saviours advice, namely, To take heed, as in a cafe of danger, how we pass sentence upon others (because, look; what,
what measure we mete unto others, we must expect from God in like cases) doth chiefly appertain unto this kind of Judgment.

Another notable Question doth sometimes arise, namely, Whether those humane Laws which permit the killing of some men, do justify it before God, or whether they grant only an impunity amongst men. This latter opinion was much favoured by Caesar, and Fortunius; but on the contrary so disdained by Aquinus, that he calls it abominable. Without doubt, the Laws may do both in some Cases; but whether they will do so or not, may be gathered, partly, from the words of the Law, and partly, from the matter. For if the Laws have regard to the grief and sorrow of the Offender, it remits the punishment, but not the sin; as in the Case of a Husband that kills his adulterous Wife, or of the Wife her adulterous Husband. A Wife taken in Adultery might by the Law of the Lombards be killed by her own Husband; but not so by the Roman Laws: yea if he did kill his adulterous Wife, being so taken, he was excused and pardoned, non a culpa vel a peccato, licet a pena civilis, not altogether from the sin, though from the punishment due by the Civil Law. For as St. Augustin observeth, If he that killeth or woundeth a Malefactor be a Magistrate, he is God's Minister, and not to be blamed for it; but if he be a private person, he shall be judged as an Homicide, because he presumes to injure that authority which is not given him by God. But if the Law respect some enlisting militia that is likely to happen by the delay of the punishment, then it is supposed to transfer publick Authority to every private man, whom therein is reputed a Magistrate. And of this kind is that Law in the Codes of Justinian under this Title, Quando licet publicius fide judicetur, &c. When it is lawful for any private man to revenge himself or the publick worship without a Judge. In which Law, licence is given unto every man, by severe punishments, to repris Souldiers when they are found straggling from the Army, and plundering the Country: And the reason of the Law is there added, Melius est occurrere in tempore, quam exstita vindicare; Better it is to prevent mischief in their beginning, than to revenge them when done. We therefore (faith the Emperour) grant you licence to avenge your own wrongs, and what is now too late judicially to punish, we shall endeavour to suppress by our Proclamation. That no man shall hereafter spare a Souldier for plundering, but shall inflict and assault him with weapons, as if he were a common Thief. And of the same kind also is the subsequent Law concerning Souldiers defenting their Colours, Let all men know, (faith he) That against Robbers and Souldiers that fly from the Army, power is hereby given to every man, for the preservation of the common safety, to execute publick revenge. And thus is that of Terrinian to be understood, In reis Majestatis, & publicis Hostes, omnibus miles est, AGAINST TRATERS and publick Enemies, every man is a Souldier. There is not only in Great Commanders and other Potentates, an innate and constant purpose of doing well to the Publick; but it is both lawful and honest for every man, that will, to be troubled at the calamities that befal the Commonwealh he loves, and to promote, as far as he is able, the publick safety and prosperity thereof. But the right of killing Enemies (whom they also call Bannites) differs herein from those mentioned in the said Laws: For as to the former, it is necessary that they should be particularly sentenced unto death before they be killed. But as to the latter, a general Edict, together with the evidence of the Fact, is as authoritative as a Sentence particularly denounced. So thought Quintilian, There are some crimes so evidently committed against the Commonwealh, that the very sight of them is enough to justify our revenge.

Now let us see whether all acts are such as ought to be punished by humane Laws. And certainly they are not: For, in the first place, the internal acts of the mind, although they afterwards come to be known unto others, as by confession, or by some other accident; cannot be liable to the punishment of men, because it is not agreeable to humane nature, that any right or obligation should arise from acts merely internal. And in this sense are the Roman Laws to be understood when they say, Cognationis nonnulla neminem meret, (which we render thus, Thought is free;) yet even those internal acts, as they have their influence upon the external acts of the Body, have their extimation, not properly of their own, but as those external acts deferve more or less punishment, according to thefe internal ones of the mind. Those acts that are inevitable to humane nature, are not to be punished by humane Laws. For though nothing be imputed to us as a fin, but what hath the concurrence of the will, and is done freely; yet to abstain altogether, and at all times from sin, and over all temptations still to emerge Conquerours, is above the strength and condition of humane Nature: whence it is that all forts and Sects of men have esteemed it natural for man to sin. As among Philosophers, Socrates, Herocles, Seneca; amongst Jews, Philo; amongst Historians, Thucydides; and amongst Christians very many have left us their testimony upon Record. There is no man to be found that can in all things justify himself, faith Seneca. A little before he had said, Amongst others the calamities that attend Mortals, this is one, namely, The darknes of the understanding, which betrays not only to a necessity of error, but to the love of errors. And presently after, Qui de se fat qui se profittere omnibus Legibus innocens?
Of Punishments.

Chapter XX.

Who is he that can plead his innocence to all the Laws? and in another place, pecuniam omnes, &c. we have all sinned, some more, some less; some intentionally, others haply by the perfusion of others, or violently carried away by the lowness of others; none of us through levity, nor adhering to good counsel, and some upon the sudden approach of dangers, lose our innocence though willingly, and not without some reluctance: neither do we sin only for the present, but we will continue sinning to our death; and although a man do purge his conscience never so well, so that nothing doth either disturb or deceive him, yet is it but by sinning, that we arrive at this innocence. Thus likewise Belarius in Procopius, not at all in sins, falls not under the power of humane nature, neither can our weaknesses bear it: Si puniendus est, cuncta maleficaeque ingenium est, pava nominem excipiet; if faith Seneca, every man that is of a depraved nature were to be necessarily punished, no man would go unpunished. To the same purpose is that of Sopater, He that will so punish, as if he would have men altogether without fault, must needs exceed the natural bounds of correction. Of the same mind was Diodorus Siculus, Strictly to observe whatsoever is done amiss, and severely to punish every offence, is a wrong done to humane frailty, and to forget the weaknesses that is common to all mankind. For as the same Sopater faith wisely, Our lefser and as it were, daily flipp of sinfullness, are rather to be convinced, than punished. And indeed it may well be doubted, whether such as these, may properly be called sins; because though we have freedom as to this or that sin, to do, or not to do it; yet not at all in sin in respect of, our natural frailty is imposible. Every Law then (as Plutarch in Solon's faith) should command things possible, if it intends to punish a few profitably, and not others unnecessarily. Some sins there are that are inevitable, not limable to mankind in general, but to this or that particular perfon, or to this or that particular time, or age, by reafon of such or such a temperament of the body strongly inclining the mind, as Seneca observes, Morum variatitates mixtira elementorum facit; the variety that is in men manners, is occased by the various mixture of the elements, or by some overgrown customs, which notwithstanding are usually punished, not so much for themselves, as for some former errors; as either for neglecting the remedies whereby they might have been prevented, or because those difealms of the mind were voluntarily contracted. Let's daughters made him drunk, and then lay with him, but he knew it not; whereupon St. Aug. passth this sentence on him, That he deserved to be punished, not for his inceff, but for his drunkenness.

Thirdly, Neither are those sins to be punished by humane Laws, which are neither directly nor indirectly against humane Society, or against any other man; because there can be no reason assigned why such offences should not be referred to the supreme Tribunal of God himself, who is most wise to understand, most righteous to perpetrate and weigh, and most mighty to revenge and punish them: wherefoere all humane punishments as such sins are plainly unprofitable, and therefore vain. Hence notwithstanding, we are to except such punishments as tend only to reformation, although haply it may no way concern others: neither are those sins to be punished by humane Laws, which are opposite to such virtues, as the Laws do not compel, but peradventure only, and exhort us unto; as those of mercy, liberality, gratitude, &c. Seneca discussing this quæstion, whether the sin of ingratitude be punishable, resolves it thus, Cum res bonifia fia fit referre gratiam, definit bontas effi necessaria fit; force to be thankful is a thing eminently bont, it would cease to be so if it were unnecessary; which he thus explains in the subsequent words: For (faith he) if to be unthankful were punishable, no man would more commend a thankful man, than he doth that man that refrefes what was deposited with him in trust, or that man that pays his just debts: neither whereof can with bontly be detainted; and therefore are not couteous but debts, which whose willing-ly pays, we do not so properly commend, as discharge him: Non erad rei gloriosae gratiae effe, nisi migration suiffa suum fit; it were not so lovely; so grateful a thing to be thankful, if to be unthankful were not base. (He that provides alimony for his wife and children, or that feeds and pays his servants for their labour, deferves not thereby the honour of being reputed liberal or charitable, because bontly he doth it for fear of the Laws, which have power to force him to do it: But him that relieves the Poor, cloaths the naked, redeems the captive, we commonly magnifie, and extol for his charity; because these acts depend wholly upon the freedom of the will, and if he did them not, No Law can punish him.) So Seneca the father, Thou wilt say unto me, we are no where commanded to do this: whereunto he answereth, Hinc rei affectatio immensa est, itaque nulla vindicta est; because the esteem of a grateful man is so precious, for (as Solomon faith of a vertuous wife, His price is above rubies) therefore there is no punishment awarded unto the ungrateful; for such as these, are not so proper-ly vices, as defects of virtue, for which, children we may be, but not punished.

It follows that we inquire, whether Magistrates may sometimes forgive or pardon of-fences; which the Stoicks deny, but upon very flender grounds: For they say, all fixed are equal, and therefore if some, then all are equally to be punished. Again, a wife man have they, (and such should every Magistrate be,) ought to look strait forwards to what he ought to do as a Magistrate, and not to do any thing contrary to his duty. Besides pardns, they
they, is the remission of punishment that is due; but a wife man will do his duty, and give unto every man what is his due: But the fallacy lies in the word due: for if by due, we mean that which a man may lawfully do without injuring any, then it will not follow, That he that doth not punish, doth not that which he ought to do. But if by the word due, we understand that which we must do, then we answer, that there is not always such a necessity; for in this sense, though the offender be by the Law punishable, yet is it not always necessary that he should be punished: for thus, the punishment is not always due, but lawful only. And this may hold true as well before the penal Law is past as after: against these Stoicks Diodorus Sticlus in his fragments argues well, Verna melior pane excitatione; it is much better to pardon than to exact punishment. So doth St. Cyprian. There is (faith he) a great distance between the opinions of Philosophers and Stoicks, who hold all sins to be equal, and that a wife man must not easily be bended; and the opinion of Christians, who hold that to remis punishment is sometimes better than to exact it.

The Malefactor may be pardoned before the penal Law be ordained; for doubtfles he that offends, lies under a punishable condition naturally; but yet it follows not that he must necessarily be punished. For as Julian speaks of Eusebia, though some there be that do serue to be treated ill, and punished, yet is there no necessity that these should be destroyed: Because this depends upon the coherence that there is between that punishment, and those ends whereunto punishments were ordained: wherefore in cafe Firth, these ends be not of themselues in a moral estimation necessay. Or fecondly, if there occur other ends on the opposite part no less profitable or necessay. Or thirdly, if the ends proposed by punishments, may haply be by some other ways obtained: then it is plain that nothing can precisely oblige us to require punishment.

As for example, in the first cafe, when the offence is so privately committed, that few perffons take notice of it, and the publick traduction whereof would be not onely necessay, but haply damagable: were it not better to concieve and dilemble the knowledge of it, and not at all to punifh it, than by punifhing it, to make it the more publick (as in the cafe of Scandal?) so Cicero of one Zenuxi, Additus in judicium, sertatte dimiti non oporurur, conquirere ad judicium necesse non fae; being brought unto judgment, he ought not to be defignifi but to have brought him unto judgment there was no necessity. Again in the second cafe, sometimes the end that we propofe to our felves in punifhing is overballayd by other ends which are no less profitable or necessay: As when the offence is committed by one who either in his own perfon, or by his parents, hath highly merited from the Commonwealth. For then as Seneca well observes, Beneficium superiens appaeret injuriam non patiun; we cannot see the injury done, for the glory of his preceding merits. Thirdly, sometimes again the end that we propofe to our felves in punifhing, may better be obtained by some other ways, as when reproofs will ferue to reform an offender, what need is there of blows? or when a man is ready to satisfie an injury with an ingenuous conffession, and an humble lufcriffion, it is in vain to exaft punishment: whereunto that wife Hebrew had refpeft when he faid, That it became the yift to be mercifoul. For seeing there is no punishment, especi- fly it great, but in it felf considered hath somewhat in it that is repugnant, not to justice, but to charity: Surely common reafon will eafily be perfuaded to abfain from it, until by arguments drawn from a greater charity, and a more universal good, he be irre ftably overborn, and hindered. Very appofte unto this, is that of Sopher, where he fays, Jufiitia pars illa quod contrac, ad quaelitatem reducit, omnino refufpit omne gratiae genus: at ea pars que circa delicta occupatur, non recusat faeae & blandam gratiam faecem; that that part of justice, which weighs all contrac, in an equal balance, utterly reject all kind of favour: But that which is converfant about offences, refufh not sometimes the moke and lovely face of the graces. The meaning of the former part of this fentence, Cicero delivers in thefe words, The way of difpenfing this right is in some things to do nothing through favour: And the latter part of it Dion Francrifus thus explains, Bonum praefidus oifice ignifcre; it is the duty of a good Prince to forgive. And Favorinus fafe we read thus, That which men call clemency is nothing else but a fenfible mitigation of the rigour of the Law.

In punishment these three things do offer themselves to be considered, Either that they should be altogether exacted, as in such crimes as are of dangerous Precedents; among which, Josephus reckons Parricides, which as who fo commits, violates the Law of nature, and takes away the life of man; so he that doth not punish, doth himself sin against humane nature. Or, fecondly, That they should not at all be required: as when some publick good requires that it should be altogether omitted: or, thirdly, That either of these may be done lawfully. This is intended by Seneca, where he fay, That clemency depends upon our own free will. But then lay the Stoicks, Parce faepius, non ignifcre: He fpares, but forgives not. As if it were not as lawful for us (with the vulgar people, being the Masters of speech) to express that by the word pardon, as for them to do it by the word flare. But not only herein, but in many other cafes we find that to be true, which Cicero, Galen, and many others have observed, That most of the disputations of the Stoicks are
are about words only, which a Philosopher should principally avoid. For as he that wrote to Herennius truly notes, Vitiofcm ett Controversiam intendere proper noninum mutatim; To heighen Controversies about the change of names, is vicious. And as St. Augustine argues against the Academicians, Wipes et disputationibus in verborum quaspiam immorari, cernit remedium medium de rebus remanserit; It is absurdi contest about words only, when there remains no difference at all about things.

But the pardoning of offences after the penal Law is past, seems to be more inconsistent with the integrity of a Prince; because he that is the Author of the Law, is in some measure bound up by his own Laws, which is true as the Law-maker is a Member of the City, and as so only considered; but not as he ffulfains the authority, and is as it were the Body of the Commonwealth: For, as such, he may take away even the whole Law; for the nature of an humane Law is such, that it depends upon the will of the Law-maker, not in respect of its institution only, but of its continuance. But in case he do subvert or take away any Law without some probable reason or cause, he sins against the Rule of Polity. But as he may take away the whole Law, so alfo may he take away the condemning power of the Law, as to this or that person, or to this or that particular Fact, the fame Law remaining in force as to others by the example of God himself; who, as Lactantius obferves, when he instituted Laws for men, did not intend to deprive himself of the power of pardoning such as should offend against those Laws. It is lawful for a Prince to revoke the sentence of death, and to aboive a person, though condemned to dye, faith St. Augustine; whereof he adds this as the reason, Quia non est subjectus Legibus, qui habet in potestate Leges ferre; Because he is not subject into Laws, in whole power it is to make Laws. For the condition of a Magnificat is one, and the condition of a Prince is another: the Magnificat is corrupt, if his Sentence be more remiss than the Law: but to mitigate the rigour of a severe Law, is sometimes the Glory of a Prince. * Seneca speaking in the Perfon of Nero faith, Occidere contra Legem nemo potet, feruare nemo, prater me. Kill contrary to Law no man can, and save none can, besides my self. But this alfo must be understood, that it ought not to be done without probable cause; but what these probable causes are, though it cannot be particularly defined, yet must we grant that they ought to be greater after the Law is past, than those that were looked at before; because unto the other caufes, for which punishments are required, there is superadded the authority of the Law, which is fit should be maintained. But the Causes exempting any man from the penalty of the Law, are usually either intrinsical, or extrinsical. Intrinsical, as when the punishment compared with the Fact is severer, if not unjust.

Extrinsical. When a man former merits, or some other thing commending the person offending, pleads strongly for his pardon: Or when we discern some extraordinary hopes of future good in the Delinquent: but especially if the reason of the Law do at least particularly caufe in that Fact for which the punishment is to be inflicted: For although the general reason of a Law, where it is not counterballanced with a contrary reason, is sufficient to uphold the vigour of the Law; yet the failing even of that which is the particular reason of the Law, doth so far operate that the Law may more easily, and with less detriments to Authority, be diffpelled with; as Gratian proves by many instances. And this usually falls out in such fubs as are committed through ignorance, though not altogether blameless, or through impetuosity of mind, which haply might (though not without much difficulty) be overcome. Whereunto a Christian Prince ought to have some regard in imitation of God himself, who in the Jewish Law did mercifully provide that most fubs of this nature should by some kind of Sacrifices be expiated; as we may read in the fourth and fifth Chapters of Leviticus. And as in the New Testament we may find confirmed both by words and examples, wherein he declares how willing he is to pardon such fubs to those that repent: as Luke 23. 34. Heb. 4. 15. 1 Tim. 1. 13. And by those very words of Christ, Father forgive them, for they know not what they do. By which words Theodosius the Emperor was so wrought upon, that he freely forgave the Antiochians, whom he had purposed to destroy, as St. Chrysostome records.

Hence then we may discern the error of Ferdinandus Valsginis, who taught that the Laws were in no cafes to be diffpelled with, but only to fuch wherein the Law-maker, had he been consulted with, would have concfecd. That it was not his intent that in that Cafe his Law should be observed. For Valsginis there doth not well distinguish between the equitable interpretation of the Law, and the relaxation of it: whence it is, that in another place he reproves Thomas and Sextus for saying, That the Law was binding, though the reason of that Law did particularly caufe; as if they took the Law to confift in the bare letter, which they never thought. But every relaxation of the Law, which may be, and often is, either granted or omitted freely at the pleasure of the Prince, is so far from being referred to equity properly so called, that even that relaxation which is due, either out of charity or polity, is not to be referred thither. For it is one thing to take away the efficacy of the Law, upon fome probable cause, or upon fome urgent occasion; and
and another thing to declare that that Fact was not at the Law-making so much as thought upon by the Maker of it. But let this suffice concerning the taking away the punishments. Now let us see what may be said concerning their infliction.

By what hath been already said, it appears, That in punishments two things are consider-able, First, The merit of the Crime; secondly, The profit that redounds by the punishment. As to the former, Nemo puniendas est ultra meritum, No man ought to be punished beyond the merit of his offence: for, as I said before, There ought to be an equality between the sin and the punishment, according to that of Horace,

Regula peccatis, que pares irrogat aequi.

Let sins have Rules, which equal pains require,
And not plague petty faults with Rods of Wire.

Whereunto we may add that of Cicero to Brutus, There is (faith he) a moderation to be used as well in punishing as in other things. And therefore Papinianus calls punishment the valuation of a crime. And Aristides faith, That it is agreeable to humane nature that there should be bounds prescribed, beyond which revenge should never stray, (in imitation of God himself, who when he proceeds to Judgment, is said to lay Judgment to the Rule, and Righteousness to the Balance, as if he would retale it, as it were, by weight and measure.) But Demosthenes in his Epistle for Lycurgus’s Children, doth not approve of such an equality as is barely in weights and measures, but with respect had to the purpose and intent of the Delinquent; and then he concludes, That within the Bounds of Merit, all sins may be punished more or less, so far forth as the punishment shall be thought profitable.

In the merit of the crime, three things are to be examined; First, The caufe that did provoke; Secondly, The caufe which ought to have restrained, and, Thirdly, The fitness and capacity of the perfon to either. As to the first of these, there is, doubtles, some caufe that moveth every man to evil. There is hardly any man wicked, but for some end; or if there be any man that loves wickedness for wickedness fake only, surely he is not fo properly a man as a Devil. The greatest part of Mankind are led unto sin by their affections; So faith St. James, Lust conceived, and broughteth forth sin. Whereunder this Notion, Luft or Appetite, I comprehend alfo that vehement desire of declining every thing that may hurt us, which of all others is the most natural, and so the most innocent. Oft-times a man is almost informed upon a sin, to avoid some present danger; as when to avoid death, imprisonment, torment, or extreme poverty, he doth some act of violence or injustice, and then the fear of the evil that pursues him seems to render his sin the more excusable. Whereupon Demosthenes infers, That if a rich man be unjust, he deserves doubly to be punished, in respect of what he suffers for the like sin who is oppressed with poverty. For before such Judges as have any sentiments of humanity, the poor man necessity pleads strongly for pardon; whereas they who, forthwetting with abundance, sin merely out of wantonsome, can have no excuse at all for their wickedness. Thus doth Polybius exclaim the Areopagite, that to avoid that imminent danger that threatened them, were enforced to break the Articles of their League with the Grecians against the Ætolians. The more vehement the temptation is, the more pardonable is the crime. A Woman of Smyrna, as

Gellius tells the Story, was convented before Cn. Dolabella the Proconcil of Asia, for poyoning her Husband and his Son at the same time. The Fact She confess’d, alleging, That She had good caufe fo to do; because her Husband and his Son had betrayed and murthered her own Son by a former Husband, being a young man, innocent, and of singular hopes; which Fact was so clear that it could not be denied. Dolabella calls a Coun cil, but none durft pass Sentence in fo doubtful a Cafe; for the Woman’s Facts being confess’d, they thought, ought not to go unpunished, and yet the revenge She took, for the murder of her Son, appeared to be but just. In conclusion, Dolabella sent her to Athens to be judged by the Areopagites, as being the most knowing and experienced Judges of that Age, who upon a full hearing of the Caufe, adjourned the determination of it for a hundred years; by which means they neither acquitted the Woman of her crime against the Laws, nor condemned her, though guilty; because the violence of the temptation pleaded for pardon. The les of provocation a man hath to do evil, the greater is his sin. Whence Aristote infers, That the sin of incontinence is greater than that committed through fear, because it is more voluntary; for what a man doth out of fear, is to preserve himself from detraction: and in such a Cafe there is a force upon the will. But lust is conceived within us, and therefore hath the more of evil, because it hath a larger share of the will. With whom accords Philo upon the Decalogue, All other vehement perturbations of the mind are occasioned by the assault of some outward temptations, which seem to happen against one will; only our lusts, becau
XXX.

The Causers referring from sin.

cause they are conceived within us, can be imputed to none but our selves. All sins, faith Chrys.
focusome, merit not the same punishment, but those deserve the greatest which might cleafly be re
fected. Hence it is, that in another place he infers, That the Slanderer is a greater fin
ner than a Fornicator, a Thief or an Homicide, because these may have vehement temptations, but
the Slanderer none but his own Will. Men do not dispute a Thief, if he steal to satisfy his
own foul when he is hungry; but be he committed Adultery with a Woman lacketh under
standing: He that doth it deftroys his own foul, Prov. 6. 30, 32. All other appetites do
tend to fome good, either real or imaginary; things that are really good, befeides
virtues and their actions which cannot entice unto sin, (being always at peace among
themselves) are either delectable, as pleasures; or such as are desirable in order to things
that are delectable, which we call things profitable, as abundance of all outward enjoy
ments. Thofe that are imaginary only, and not really good, are either the excellency
that we think we have above others, as it is separated from virtue and profit, or re
vengence, both which, the more devious from Nature they are, the worfe they are. (Natu
rals defideria fonta font, ex falsa opinione nascendia nobis defuntur non habent: Our natu
ral wants (faith Seneca) are easily summed up, but thofe that are grounded upon a false opinio
on are infinite.) St John collects all the provocations to sin under thee three heads, the
lutf of the flefh, the lure of the eye, or the pride of life; the firft whereof comprc
hends the desires of pleafure; the fecond of profit; the third of vain-glory and anger.
And This in his Exposition of the Decalogue delivers all that is Evil from the desires eit
her of Riches, Honour or Pleafure. And Latinius describes the office of Virtue to con
fit in the suppression of our anger, in bridling our luft, and in the moderating of our de
sires of riches. For (faith he) all our unjust and wicked actions do arise from one of
these affections, which elfewhere he repeats.

The general caufe that should refrain us from sin, is, the injuflice of the fact: For we
speak not here of all fins, but of thofe which have repect to fomething without the per
son finning. Now this injuflice is fo much the greater, by how much the damage thereb
y done to another is greater. And therefore thofe are the greatest injuries that are a
ctually commiffated, and thofe the leaft, which though they have made their progres
througb some Acts, yet are not arrived to the utmost Act: For which reafon the covering
of our neighbours goods, is placed by Moses in the rear of the Decalogue, as being a
sin of the lowest form, or as it were, but an introduction to sin, which the farther it goes,
the worse it is. In either of thofe things, that is esteemed the greateft crime, which di
turbs Common Order, and thereby gives offence to molt men. After this follow the
injuries done to particular persons: And of thofe the higheft is, that which touches the
life of Man, exprreff by Moses in this Precept, Thou shalt not kill. The next is, that injury
done to a Mans Family, the foundation whereof is laid in Matrimony, contained in thes
words, Thou shalt not commit Adultery. The third and laft are, fuch as are committed ag
ainft a Mans private Eftate, either directly, as by fealing; or indirectly, as when by our fal
Testimony we prejudice the Right of others. These may be yet more acutely divid
ed: But it pleafed Almighty God in the Decalogue to follow this Order. For under the
name of Parents, which are Natural Magiftrates, it is fit that Magiftrates and other Ru
lers and Governors be comprehended, by whose Authority Humane Society is main
tained. Next unto this follows the Interdiction of Homicide; the ffitution of Mat
rimony, and the prohibiting of Adultery; then Theft is forbidden, and falle testimonies:
d in the laft place, fuch fins as are inconfummate. Neither amongst thofe Caufes that
should refrain us from sin, are we to place that fingle damage only, that is done directly
againft others; but that also which is probably confequent to it; as in firing an Houfe,
making a breach in the sea-bank, or in a bulwark wherein the lives and fortunes of many
Families are concerned. Moreover that Injuflice, which we put here as a general caufe of
reftrain ing from sin, is sometimes aggravated by the addition of another crime; as for
impity to our Parents, our inhumanity to our Kindred, our ingratitude to our Patrons or
Benefactors. Again, a fin is reputed the greater being the ofter committed; for al
much as an habit of evil is far worfe than fome particular acts of evil. Once to erro is par
donable: but in ildem flagit eos errore cerna et mentis: To daff often againft the fame fin is
fully, nay, madre; the ofter we offend, the greater punishment we receive. And from hence
we may collect how far that was naturally Righteous, which was usually done a
mong the Perfians, who before they passed sentence upon a Malefactor, looked back to
his former life, and compared it with the present Crime he ffood convicted of; for they
thought it unjust to take away the life of any man for one evil act, unlefs the whole couref
of his life had been otherwife finfull. And indeed what Apinus Polîb faith, is very true;
We are not to judge of any perfon by fome particular act, but by his continued habits.
(Non are to be accounted notoriously wicked, but they that have long persisted in a con
tant coufe of wickednefs, Nemo repente fit peffimus: No man arrives at the heights of in
pucacy at the fi: For our innocency leaves us not but by degrees; and boldnefs,
it may learn not to startle at grolier villanies, gathers strenth and courage by the frequent committing of lesser ones.) And yet what Afrimis Pollio said concerning the judging of mens present Crimes by their former lives, ought to take place in such only, who being otherwise not wicked, have been on a sudden surprized by the sweetnefs of some particular fin : But not in those who have changed the whole course of their former lives. For of these God himfelf by the Prophet Ezekiel proclaims, that he will have no regard at all to their former deeds, whereunto that of Thumipudos may very fitly be applied, They deferve doubly to be punished, because they are Apoflates from goodnefs, and degenerate from Virtue to Vice. And therefore it was wisely provided by the Primitive Chriftians in their confines of other mens failings, That no Judgment fhould pas barely for the crime committed, but with refpectiation on their fore-paff lives, and on what followed; as may be feen in the Council of Ancyra and others: So St. Chrysolfome, Punishments are not always to be inflicted according to the sole meafure of the Crimes : but we ought to enquire into the mind and manners of him that commits them. But a Law being once Enacted against any one Vice, makes a fin exceeding full; So St. Aug. Lex prohibnit omnia delicta con- geminat; The Law in prohibiting doubles all offences; for it is not a single fin when we commit not that only which is in it felf evil but that also which is forbidden us. And by this argument St. Paul aggravates the fins of the Jews, in refpeft of thofe of the Gentiles, because they had the Law to direct them. We must not therefore be rash in judging, nor (as Cicerone advifeth) in grave and ferior things determine of the will and intentions of the perfon ac- cused barely by the fact, but by his manner and customary of living. (A good man may haply be enflaft by the sweetnefs of a fin, or by the fudden guilt of temptations, and yet in the general course of his life he may retain his integrity: The heart of Asis is said to be upright all the days of his life; and yet when he was fick, it is objected againft him, That he fought unto the Physician and not unto the Lord.)

Now before we can rightiy understand how to punish, we muft know the aptnefs and capacity of offenders to apprehend the caufes which do either excite them to commit, or refrain them from committing of fin : Now this aptnefs or capacity of theirs, we may guess at, by either their temperament of body, age, fen, education, or some of the circumftances of the act. For it eafily be granted, that children, women, fools, illi- terate perfons, and ill educated, cannot so well diftinguifh between juft and unjuft, law- ful and unlawful, as they that have more perfpicacity and ingenuity; and that they in whom choler predominates, are prone to anger and revenge, as they also that are of a fanguine complexion are to dalliance; fo young men are propenfe to one paflion, old men to another; infomuch that Nature seems to plead somewhat in their excufe, as to fuch fins as are, as it were, congenial with them, as was well obferved by Andronicus Rhodius: And although it cannot exempt them altogether from punishment, yet without doubt it renders the fault the more tolerable. So the apprehenfion of fome imminent danger quickly be- gets a fear, and then we rashly adventure upon a fin to avoid that danger: In like man- ner, fome fudden and unexpedtation injury fets our hot blood on boiling, and then imme- diately before reafon can interpofe, we attempt a revenge. These are the fudden irru- ptions of paflion, and not the deliberate acts of the Will, which certainly are in them- felves more excufable than thofe which arife meerly out of the desire of pleaiefure, aff- fult us not fo violently: And therefore may either be deferred, or admit of fome oth- er matter wherein without injury without to any. So St. Chrysolfome, Latif (faith he) seeks cution only, but not with this or that particular perfon: And fo Aristofle, Anger and cruelty are much more natural than covetousnefs, or an inordinate defire of things unne- cefary. For this is generally to be obferved, That the more the judgment is hindered in its free choice, and in the act of difcerning between Good and Evil, the more natu- ral the caufes are exciting to fin, the lefs of evil the fin hath, and confequently the lefs it fhould have of punishment. Difficultiae faciis eft omenia; The greater difficulty there is in the thing commanded, the sooner is the pardon if not performed: Quamvis potius virtutis fini, tanto contaminacio crimen oneratur, fcele Territorial; The more power and the greater helps we have to avoid a fin, the more contumacy we betray in the committing it. Aristofle likewife in the place before cited, accounts that men left temperate, who being either not at all, or very weakly provoked with carnal defires, either seeks after enormous pleasures, or flies from fome small inconveniences; than he that is urged thereunto by fome vehement passion. For what would the fame perfon do, if he felt those vehement perturbations of mind which are inci- dent to youth, or that grief and vexation that poverty brings with it? Pertinent whereunto is that of Antiphons:

Qui cum sum opulentum requirerit quicquam faciunt, Hunc, si effet pauper, quid non fatisrum putas?
He that being opulent, unjuft will be, What will he not, if pinch by poverty?

And
And what we every where read in Comedians, concerning the doting love of old men. From these causes we ought to guess at the merits of mens sins, and to fit their punishments accordingly.

The Pythagoreans hold that justice requires in parte alius, (i.e.) a sufferance in the like kind by way of punishment; which is true, but not so to be understood, as if he that hurts another deliberately, and without any just cause given, should suffer just so much again, and no more. For the Law of Moses it left, which is a perfect pattern for all other Laws, rejects this expostulation; for it requires, That he that steals any thing from another, should restore four and fivefold: and the Attick Law did require, That a Thief besides a double restitution (whereunto that of St. John Rev. 18. 6. refers) should remain in bonds for certain days, as Demosthenes testifies. And when the Moysans had without any right, extorted tributes from the Thebans, Hercules compelled them to restore it unto them double, as Apollodorus testifies in the Grecian Laws testifies, That the injured person is permitted to recover more than the damage suffered by way of revenge: whereas St. Ambrose gives this reason, Qua irem â detrahendo, aut pena deterrentur, aut multâ revocent; that so they may afflict the Thief from his pilfering by the punishment, or discourage him by the mult. Seneca speaking of judgments to be inflicted after this life, faith:

XXXII. Couter-parli-
ment rejected.

Majore nostro.

Our Crimes with greater plagues are there
Punish'd, than those we suffer here.

Strabo observed a Law among the Indians, That if one man had maimed or dismembered his fellow, besides the common punishment of retaliation, he was to lose his hand. And in that book which is entitled Aristaete's Morals, we read, That it is just, that he that willingly puts out another man's eye, should suffer not only in the like kind, but somewhat more. For as Philo in his Special Laws observes, It is not equal that the noxious and the innocent should suffer alike. And from hence it is, that the very attempt to commit some fins, though not consummated, and consequently have les of evil in them, than those that are perpetrated, yet are equally punished according to what they intended: as we may read, Deut. 19. 19. in the case of a false testimony; so Dem. 22. 19. in the case of a Husband accusing his Wife of whoredom to defraud her of her dowry; the like we may read Exod. 22. 9. As also among the Roman Laws it was provided, That he that carried a weapon against him with an intent to kill a man, was to have been punished as though he had done it. And if it be objected, That if the bare attempt be punishable with death, surely the execution should be more severely punished: I answer, that because nothing can be more grievous than death, and because a man can dye but once; therefore we must necessarily acquiesce in this punishment, because we can go no further, unless we do sometimes add thereunto some kind of torments, to make death it self the more terrible.

Punishments are not to be considered barely, but with respect had to the quality of him that suffers them. The same mule or fine that is grievous to a poor man, is no punishment at all to the rich: and the Stocks or Pillory, which by the viler sort of people are lighten, are worse than death it self to the nobler. The Roman Laws did often make use of this difference of persons and punishments; and Bede upon this consideration did frame a kind of harmonical proportion: whereas notwithstanding indeed, it is but a simple equality between the merit and the punishment, such as is in numbers, as also in all contracts between the things held and the money, although the same Merchandizes are worth in some places more, and in some les, as also is money according to its either plenty or scarcity. But we must acknowledge that oft-times among the Romans, this was not done without too great a respect had to the persons and their qualities nothing appertaining to the fact, which acceptance of persons Moses his Law did exceedingly abhor. And this is, as we have said, the intrinsic valuation of a punishment.

But that which restrains us in punishing, within those bounds which the Laws permit, is the love of him who is punished, unless a greater and jufier love of many persuade us other wise, for some cause that is external; which sometimes is some extreme danger that may arise from him who hath offended, but very often, the necessity of an example. But this most usuallly ariseth when the encouragements to any sin are general, and cannot be re preht without sharp and speedy remedies. Now the principal encouragements to sin are these two, namely Custome, and Facility.

Which two being so dangerous, ought to be provided against by sharp and severe Laws; The Hebrew Law did punish a Thief more severely for stealing Sheep or Oxen out of the field, than out of the house, Exod. 22. 1. 9. For he that stole out of the field, was to restore four and fivefold; but he that stole out of the house but double: The reason where-
of was; because Cattle in the field are more easily driven away, and therefore had need to be secured by the severer Laws. Those crimes, faith Cicero, are to be fitted with the severer punishments, which cannot be prevented without great difficulty. So Jusfin, speaking of the Scythians, faith, There was no crime so heinous as Theft; because to them who had neither houses, nor incoloures to secure their herds of Cattle, or their flocks of Sheep in, what safety could there be, if it were permitted unto them to rob and rav? Much like unto that in Aristotle's Problems, where speaking of such Thieves as frequented baths, he faith, That the Law-giver, considering that the owners could not in those places look after their things wisely, committed them to the safeguard of severe Laws. And accordingly we find that thefe Balneary Thieves were in Athens punished with death; if what they there stole, were above the value of ten Drachmae, as Demeas testified against Timocrates. The Caulm of a fact, although it detraet from the fome from the crime; (as Pliny speaks in fuch a cafe, he gave him his pardon, and that not without reafon; for though the fame were forbidden by the Law, yet it was it commonly committed, and not punished;) yet did it require, in some forts, to have been severely punished: Because as Saturninus speaks, Nimmen multis graffantibus, opus exemplo eff; when a fmall begins to spread, and Mallefactors grow numorous, then some exemplary punishment seems necefsary: (for as an hot-headed Horfe hath need of a strong rein, so the more publick and customary a fin grows, the falper should be the punishments to opprefl it.) Bat the former that is, clemency in acquitting offenders is more to be followed in giving fentence, and ought to be our guide in paffing Judgments; but the Laws themselves ought to be fovere and impartial, yet with due regard had to the time when those Laws or Judgments were made and publifled, because the benefit that arifeth by punishments hath refpeft to the univerfality, as all Laws alfo have; but oflences do vary, and are not the fame in ever offender, for in some, they are greater, and in some, lefs.

XXXVI.
Clemency in the mitigation of punishments.

But where there are no great or urgent caufes to exact the fervency of the Laws, there we fhould incline to mitigate punishments. For herein confifts one part of clemency: the other part confifting in their total remiflion. Because it is a dificult thing to find out an equal temperament between the fin and the punishment, faith Seneca, therefore let the inequality be always on the gentler fide. And in another place, Paflani f quituro poterit, concedes; fomnibus, tempore: If it may fafe be done, the leff fide is to forgive; if that cannot be, the next is to fccne the punishment. In Diodorus Siculius we find one of the Kings of Egypt highly commended for inflicting punishments lefs than the fin deserved. So Jusfin in his Epitifle to the Huns, The manner of the Romans is not to exact punishments equal to the merits of the Offenders. (And indeed (as I have before obferved) there is a great deal of mercy even in the mitigation of punishments, the leffor fome of their name and nature where the fin deserves greater.) It is faid of Marcus Antoninus, That his cuftom was always to award punishments somewhat leffer than the crimes deserved, or the Laws required. And fince the Orator was wont to fay, That the Laws ought to be fovere, but the punishments alfo milder than the Laws. The like by way of advice we find in Jperates. To make the punishments alfo lefs rigorous than the fin was heinous. This was it which was intended by the Emperor Henry, under the Symbol of a Pomegranet-Tree, with this word, Subhaer, Very sharp. And Caiffodor reports it of a King, who was often heard to fay, Where there is danger we are fvere, but where we are safe we almcst pardon: When fome Donatifs were apprehended and brought before Marcellinus, for whipping a Catholic Priest, putting out one of his eyes, and cutting off one of his fingers, St. Auguftine, fearing that he fhould have proceeded againft them by way of retaliation, humbly befeech Marcellinus, That he would not do fo, nor fuffer any thing to be done; for nothing (faith he) more becomes a Prince than clemency. And as Macedonius tells St. Auguftine, It is the duty of a Prielft to intercede for the guity.

Thus have we, I hope, omitted nothing that may conducive to the clearing of this Argument, of it felf difficult and obfcure enough. For there are fome things which, as Mainmonides faith, ought principally to be regarded in punishments, namely, The greatnefs of the fin, that is, the damage given; the frequency of fuch Sinners, the vehemence of the tem- plate, and the facility of committing it, we have referred to their proper places: no lefs than thofe seven mentioned by Saturninus, (though confediously enough.) For, fith, As to the perfon offending, he is considered principally in his aptitude to judge of the Caufes exciting to, or refraining from fin, whereof we have treated before. The perfon fuffering by that fin doth fometimes guide us to judge of the greatnefs of the fin. The place where it was committed doth either peculiarily aggravate it, or appertains likewife to the facility of finning. (For it is not the fame thing, faith Philo, to offer violence to a Stranger, as to ones own Father: Nor is it the fame thing to speak evil of a private man, as of a Magiftrate; or to commit an unlawful thing in a common or profane place, as in a sacred; or on an holy day, as on another day; in a private house, as in a publifh or refently: as for Ulpio observes, There is great difference between an injury committed in the view of the Roman people, and the fame committed in a solitary place.) The time alfo is to be considered, whether long in contri-
triving, and if so, then was the will the freer in her choice; or short and sudden, and if so, then was it done more out of rashness than out of premeditated malice. Fifthly, The quality, which may be referred, partly, to the several kinds of appetites, and partly to the Causes which ought to restrain us from sin; the greatness of the sin is likewise referred to the appetite, so mult the event to the cause restraining.

That War is sometimes undertaken for the neglect of punishing offences we have already shewed, and Histories do more where each us; whereunto is usually added the reparation of the losses sustained, when the same Fact is not only in itself vicious, but unto others damagable. From which two qualities there arises a double obligation, as first, That the person who hath done the wrong, be punished according to his merits: secondly, That the damage by him caused, be repaired. That we are not to fly into Arms upon every provocation, is evident enough. For even the Laws do not avenge themselves upon every one that breaks them, though they may safely do it: because they hurt none but such as hurt others. But small and common injuries, faith Sopater, are better connived at and diffem- bled, than punished.

Another Question doth sometimes arise, Whether the purpose or intent only of doing wrong be a sufficient ground for a just War? The Rhodians sent their Ambassadors to the Romans, to urge them (by threats) to make peace with Perseus King of Macedon: The Senate taking this as an Argument of their civil affections towards them, (though it proceeded no further than bare words) yet thought it worthy their confutation, whether this were sufficient ground for a just War. But because the Rhodians did not break out into any hostile acts, nor had made any publick Decree against them; therefore by the advice of Fortunus Cato they were neither admitted as Friends, nor declared against as Enemies: But yet this Precedent is not always to be followed, because in some Cases the will which hath proceeded to express it self by some Overt Acts (though the internal acts of the mind are exempted from humane Laws) doth contract a kind of guilt, and so is ominous to punishment. Sceer a quoque, quamuis citra extimus subfederantur, punitur; The very first attempts only of wickedness, though they fail of success, are punifiable, faith Seneca the Father: and he who purposeth and is about to do wrong, hath already done it, faith the other Seneca. So in another place, A Thief is a Thief before he defiles his hands; neither is it the least act of killing only, that denominates a marthurer; it sufficeth that he goes out armed, with a purpose to kill and to spoil, to make him in some degree guilty. Of the same opinion was Philo, they only are not to be accounted Murderers, who take away the lives of men; but they also that attempt all ways both secret and open to kill any man, although they have not, as yet, effected it. Thus Valerius Maximus speaks of Sergini Silo, That it was not his Fact that was then called a question, but his Purpose: Pluque voluisti pecare nocuit, quam non peccasse profuit; and that he would have sinned was more damagable, than that he did not sin was profitable. So Cicero pleads in the behalf of Miltio, Non eximium, sed Concilia Legibus vindicavit: Not the event of things only, but their very purporses and intentions, are by the Laws punishable. To the same purpourse is that of Periander in Pittarch, Not they only that have wronged us, but they that go about to wrong us, deserve to be punished. The Romans thought they had just occasion to make war upon Perseus, unless he gave them good satisfaction why he made such warlike preparations both by Sea and Land, and had confulted about making war upon them, though they had not, as then, committed any hostile act against him. And yet it is well observed by Lexy in that Speech which the Rhodians made to the Roman State, That it did not conft with the Laws and Customs of any City in the World, to condemn a man to death only for wilfully his enemy dead, unless he had also acted something in relation thereto. But neither is every intention of the will, though it have proceeded to some declarative act, ground sufficient for a just punishment. For if all injuries, though perpetrated, are not to be revenged, much les ought all that are only purpored or begun. For in many (as Cicero faith doubtfully) I know not whether it be sufficient for him that provokes another, to have repented of the injury he did him. For neither doth the Law of Moses award any special punishment for such sins as were inchoated against piety, nor committed against the life of a man, without judgment first pass on him; because in these, as also in Divine matters which are not clear nor conspicuous, mistakes are easie; and the passion of anger being sudden and violent, makes its effect the more pardonable. Moreover when there are such a multitude of women, whereof every man hath liberty to chuse a Wife: for any man to attempt others, and in so equal a distribution of Goods, and property, and also in so far forth as nature requires for her neccesary support, to endeavour to enrich himself with the spoil of others, is no ways tolerable. For that Commandment, Thou shalt not covet; although we took it to the scope of the Law, that is, the spiritual sense of it, it extends it self farther, requiring the purity of the mind; yet if we look to the literal and carnal Precepts, it refers to such acts of the mind only as are declared by some outward deeds, as plainly appears by comparing that of our Saviour, Mark 10. 19. where he explains that very Precept by these words, Do not defraud, which in the very same verse he had before express'd.
express'd in these, Thou shalt not steal. The very same words we find Moch. 2. 2, both in the Hebrew and Greek in the same sense. Injuries begun only are not to be vindicated by Armes, unless the matter be both very weighty, and that it hath already proceeded so far, that from what is already done either a certain mischief, though not yet what was intended, hath already befaln; or some extraordinary dangers do thereby threaten: so that the vindication be either conjoined with some caution against future damage (whereof we have treated above in the Chapter of Defence) or the maintenance of our honour that seems by that act to be wounded, or to prevent it from being a pernicious example for others to follow.

This also we must know, That Kings, and such as have equal right with them, have allo a right to exact punishments for offences done, not against themselves and their Subjects only, but for such injuries as do not particularly touch themselves; but against any person, by whom the Laws of Nature or Nations have been greatly violated. For the liberty of providing for the safety of humane Society, by punishments, which at first, as we have said, was in every particular person, (Cities and Judicatures being now inlisted) refides in such as have the supreme Authority, not so properly because they command all, as indeed because they are commanded by none. For that which takes away this right from private men, is their subjection to the supreme Powers, without whose Warrant they can attempt nothing of revenge. Yea, and so much the more honourable it is to revenge other men wrongs than our own, by which so much may justly be feared; left out of too great a sense of our own sufferings, we either exceed the just measure of punishing, or prosecute our revenge with too much malice. And upon this account it was that Hercules was so famous for subduing those Tyrants, Anteus, Bophys, Dioneus, &c. and cleansing both Sea and Land from all such noxious Creatures, which he did, not out of ambition or desire of gain, but to vindicate the cause of the oppressed, and to plague the unjust (as Philo tells us of him.) This Character is likewise given of him by Diodorus Siculus, Many Cities he restored to an happy condition, by taking away violent Tyrants and such like Oppressours. For as the fame Author speaks in another place, Orbas obit per nam de iniquis expetens; He travelled through the world for no other end but to scourge Tyrants. The like testimony doth Dion Phyficus give of him, saying, That he everywhere played the wicked, destroyed the Kingsdoms of the proud, and transferred them unto others. And let the general care that he had of all Mankind, Aristides think him worthy to be translat ed amongst the Gods. Dionysius Halicarnassensis records this and many more inhumane Customs which Hercules reformed, to the general benefit of Mankind, making therein no distinction between Greeks and Barbarians. The like doth Phryn the Tellest of the Roman, It is not to be imagined (faith he) how much we owe to the Romans, for taking away those Mafi fers among men, who placed the principal part of their Religion to kill men, and their wholefood to eat them. Thus Jufturnian commanded the Princes of the Abyfi to abstain from gelding their Children, as Procopius relates. And the King of Incha in Turam compel led all their neighbouring Nations, that would not willingly obey him, by force of Arm to abstain from Inceft, Sodomy, eating of Mans Fleth, and such like abominations; where by they obtained the justif Empire that we have ever read of (their Religion only excepted.) The like honour is given to Tiberii, for destroying those great Enemies of Mankind, Severn, Sinno and Procrisfts, who in that Age troubled all Greece with their barbarous inhumanity; and is therefore by Euripides called, The Scourge of wickedness.

My Noble Allies through Greece are so extoll'd, That I the Scourge of wick'dness am call'd.

For as Valerius Maximus reports of him, Whatesoever Monfter of cruelty that Age produced, by the strength of his Body, and the gallantry of his Mind, he subdued. So that without doubt, a War may be justly undertaken against Parricides, whereof the Sogdians were in an high measure guilty; for till they were reclaimed by Alexander, they usually killed their own Parents. Against Canibals, or such as fed upon Mans Fleth, as the Scythians did, and the ancient Gauls, before the former were better instructed by Alexander, and the latter by Hercules, as Plutarch in Diodorus records. Against Pyrates, and fuch as live by Robberies at Sea, and the like; for against these any Prince hath power to make war, though they are not subject to his Government. For of such barbarous people, who are rather Beasts than Men, it may truly be verified what Aristotle sometimes said of the Perians, Naturale in eos esse bellum, That war against such is natural. Or as Hierolet notes, The justest war is that which is undertaken against wild Beasts, and the next is that which is undertaken against such men as are brutish. What, faith Seneca, though they do not influff my Country, yet if they be execution to their own: Though they are divided from me, yet if they injure their own people, they deserve for the pravity and corruption of their minds and manners to be destroyed. And so far we follow the opinion of Innocentius and others, who hold, That war may lawfully be made ag"
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gainst such as do break the Laws of Nature: But we cannot approve of that which Valignani, Victorius, Azoarius, and Molina have written, namely, That to justify a War, it is requisite, That the person that undertakes it be injured, either in himself, or in the Commonwealth, whereof he is the Supreme; or that he gainst whom the War is made, be under his Power and Jurisdiction. For whereas they make the right to punish to be an effect proper to the Civil Jurisdiction: We on the other side derive it from the Law of Nature, whereof we have spoken somewhat in the beginning of the first Book. And fully, if these mens Opinions from whom we differ be admitted, one Enemy shall not now have a right to punish another, even after the War is undertaken for any cause but punishable; whereas most men do admit of this Right, and the Custom of all Nations confirms it; and that not only when the Enemy is weakened and brought under, but even whilst the War lasts, not by any Civil Jurisdiction, but by that Natural Right, which was in force even before Cities were built, and is yet in force, where the Inhabitants live dispersed in private Families, and are not congregated into Cities.

But here some Caution is to be observed, the first whereof is, That we do not misapply Civil Customs, which in most Nations are deservedly received for the Law of Nature. Such almost were those wherein the Persians differed from the Græcians, whose common pretence for their making war upon the Persians was to civilize them: But as Plutarch observed, They did but cloak their ambition and covetousness under the title of Reformation: As if the disagreement between themselves and others in Civil Customs, had been a violation of the Law of Nature.

The second Caution is this, That among those things that are forbidden by the Law of Nature, we do not rashly intermit such things, whereof it cannot certainly be affirmed, that they are so forbidden, but are such rather as are interdicted by the Divine Law, in which number we may haply place the sin of Fornication, and some of those sins which we cleem to be Inceft, Ufury, &c. Thus Athenius Bishop of Amfes, They that yield obedience unto the Civil Laws of Princes only, do leave Whoredom unpunished. So likewise St. Hierome to Oceanus, The Laws of Temporal Princes let loose the reins of unbridled lusts; and condemning Adultery only, suffer men to run every where to Stews and Brothels, hoofes oceanum, fors, without control, as if it were the dignity that made the crime and not the will: But with us, what is unlawful for women, it likewise so for men, the same yoke binds both to the same conditions.

The third Caution is, That we diligently distinguish between those general maxims of Reason that are manifest of themselves, as this, That every man ought to live honestly, that is, according to the dictates of Natural Reason, and others that are nearest unto these, but so manifest, that they can admit of no doubting such as this, That we ought not to take away from another which is his. And between those maximes which are not of themselves so clear, but must be collected from those before mentioned by consequences, whereof some are easily drawn as this, admitting Matrimony, it follows, That we ought not to commit Adultery, which was so generally received, that as Philo testifies in the life of Joseph, It was everywhere punished; and Lactantius tells us, That to defile the marriage-bed was condemned by the Common Law of Nations. Others, though as true, yet are not so manifestly true, because our attenti unto them cannot be gained but by the mediation of three or four consequences, as this, That that revenge that doth acquire in another mans grief is vicious. It is here almost as it is in the Mathematics, wherein some things are of the first Notion, or next unto the first; some are demonstrations which are immediately both understood and assented unto: But some others, though true, yet are not so evident unto all. Therefore as by the Civil Laws, our ignorance of the Law, or of the true meaning of the Law, doth in part excuse us: So concerning the Law of Nature, there is the same Reason, That our weakens to collect what was thereby forbidden by such consequences, or what an ill education hath ingenerated in us, should also excuse us: For as St. Hierome well observes, Unaquaque gens hoc Legem Natura patet, quod dedicat; Every Nation thinks that to be the Law of Nature, which is first imbibed. Now our ignorance of the Law, as it takes away a sin if it be inevitable, so also it diminisheth a sin, though it be cau’d by some neglect. And therefore those that are corrupted by some evil education, Aristotle compares to such, whole appetites are vitiated by some malignant defommer: And Plutarch observes, That there are some defaees of the mind that violently hurry a man from his natural constitution. Lastlv, this also is to be noted, (which I say once, but shall not often repeat) That those wars which are undertaken for the exacting of punishments, unless the injuries that are done are very manifest, or backt with some other cau’es, are always suspected to be unjust. For what Mithridates laid of the Romans, is oftentimes too true: Non debita Regum sihos, sed vides ac Majestatem insequi: It was not the faults of Princes, but their Power and Majesty that they perfecuted.

In such Cales then, we ought not to be too severe chastifiers of other mens infirmities, but rather pity their ignorance and their ill education, praying for them as St. Stephen did for his perfecutors, Father forgive them for they know not what they do.
Our proposed method now guides us to Crimes committed against God, and to enquire whether for the punishment of such, a War may justly be undertaken. Courousans handles this question at large: But being swayed by the Authority of others, he holds, That this punitive Power cannot subsist but where there is a Jurisdiction properly so called, which we have already rejected. Whence it follows, That as in the affairs of the Church, the Bishops are in some measure said to take upon them the care of the Universal Church, (for so St. Cyprian speaks. It becomes us to watch over the whole body of the Church, whose members are dispersed into several Provinces; And again, There is but one Episcopacy, whereof every one holds his part entirely:) So besides the charge of their particular Dominions, Kings may be said to assume the general Care of all Humane Societies. But a better Argument brought by such as deny such a War to be lawful, is this, That God alone is sufficient to punish such sins as are committed against himself; for, Deorum injuriae Domina, & perjuri- rium satis habet Demum uterum; The affronts committed against God, God takes care of; and it sufficeth, That God himself is the avenger of perjury. But we must observe, That so it may be said of any other sins, God without doubt is sufficiently able to punish them, and yet we fee, That the Laws are justly and duly exercised upon such offenders by Magistrates in all Nations, none differing. But against this some reply, That those punishments are inflicted not so much for offences committed against God, as because of the damage thereby done unto men: But on the contrary, It is to be observed, That not only those offences which are committed against others directly, are punished by Humane Laws; but those also which may by conseqimeuce be prejudicial to others, as Self-murder, Sodomy, and the like; for though the principal end and scope of Religion be to purchase the Grace and Favour of God, yet hath it also a very strong influence, and works many notable effects upon Humane Society. Plato calls it, The fortresses and bulwark of all Power and Jurisdiction, and the very bond of good Discipline: Plutarch calls it, the cement of all Humane Society, and the very foundation and work-work of the Legislative Power. Philo faith, It is the most effectual charm to procure love, and that the worship of one and the same God is the most indissoluble band of friendship: Whereas on the contrary,

Heu prius facellus causa mortalibus agris,

Naturam reipoffe Dei——

All wickedness 'mongst Mortals hence doth flow,

That the most Righteous God we do not know.

Every false Opinion concerning Religion, faith Plutarch, is dangerous, and if it be accompanied with perturbation of mind, most pernicious: But to have one and the same Opinion concerning the worship of God, and to differ nothing in life and manners from each other doth produce the most perfect harmony and agreement amongst men, as Josephus tells us against Apion. And in another place, discoursing of the Reasons why most Cities were so ill governed, he adds these, Because their Law-givers did not at first rightly apprehend the true Nature of God, nor did they study to explain that knowledge so far as they were able, nor to frame their Government accordingly, but past it over lightly, as a thing of small moment. Jamblichus also hath an excellent sentence out of Pythagoras, That the knowledge of God is both Virtue, Wisdom, and perfect happiness. Aristotle therefore placed Religion as the first and chiefest of all publick cares, and as Jusfline Marryat calls it, a work worthy of the care of all Kings; and Machiavel himself affigns the prosperity of the Romans to their singular care of Religion. Philo seems to sum up the whole Duty of a King in these three particulars, The Care of his own Estate, the Care of the Publick, and the Care of Religion: All which are to be confidered, not only as in some one particular City or Kingdom, in which respect it is true, what Cyrus in Xenophon tells us of hisSubjects, that they were, Tanto fide additiores, quanto Dei erant mententiores; The more Religious they were, the more loyal and obedient they were to their lawful Magistrates: but they are to be considered in respect of the preference of the common safety of all mankind. For as Cato notes, Take away Religion, and all faithfull dealings between Man and Man, Nation and Nation, and consequently all Humane Society, and one of the four Cardinal Virtues, Justice, will be quite lost: whereby it clearly appears, that Epicurus, When he denied the Divine Providence, Jusflis quoque nili religius prifer inane nomen; Left nothing to Justice but an empty name; which, faith he, as it arifeth only from contracts and agreements, so it is no longer in force than it yields profit to both parties. Herein (faith Seneca) we cannot agree with Epicurus, who holds, that nothing is naturally Just, and that offences are to be avoided, because they being committed, we cannot avoid fear: As if nothing could refrain us from injuring others, but the fear of punishment only. Again, it is very true what Aristippus observe, That as Religion keeps Subjects in due obedience to Kings; so it restrains the Tyranny of Princes, and begets a great deal of Truth and Confidence between them and their
their people. The Prince may be assured of his Subjects Loyalty, and the people will left fear to suffer unjustly by their Prince, whom they believe to be Religious. Galen observing many questions handled by Hippocrates and Plato concerning the World and the Divine Nature, which as to the melancholy of mens manners he conceived to be very imper- fect, yet confesseth that of the Divine Providence to be of great efficacy and importance to the advancement of Virtues both private and publick: which blind Homer could very well see, as we may collect from the first and ninth of his Odyssey, where to men that were unjust and cruel, he appoyseth such whole minds were fastened with Religion.

Now Religion is of more use and greater necessity in the common Society of Nations, than in the Civil Society of Men: Because in this Civil Society, the defect of Religion may in part be supplied by severe Laws, and the easie execution of them; but the Laws of Nations, as they are but few, do are they very difficultly executed, namely by War; wherefore these Laws have always been held sacred, because God himself is the sole and immediate Judge of them, and he that violates these Laws, is made to him against God himself. The injuries then that are done against Religion, are by all Emperours reputed as common injuries, done as it were against all mankind.

But that we may pierce a little deeper into this matter, we must observe, That the true Religion that hath been universally professed in all Ages, and in almost all places, stands erected on these four Columns: First, the acknowledgement that there is a God, and that he is but One. Secondly, That nothing of all these things we see is God, but that he is something that is yet more sublime and excellent. Thirdly, That God takes care of Human Affairs, and that he doth judge the world righteous. And fourthly, That he is the Creator of all Things without himself. Which four Propositions are explained in the four first Precepts of the Decalogue: The first whereof shews the Unity of the Deity plainly, The Lord our God is one God: The second declares his Invisibility, which is the reason, that as we cannot liken him to any thing, so we cannot make any likenes or representation of him, Deut. 4. 10. Thus much doth Aristotle tell us of him, No eye ever saw him, no likeness we have of him, wherefore it is impossible by any Image or resemblance to know him. And so doth King Agrippa in Plato, To frame the likenes of that, either by graving or painting, which cannot be seen, is profane and unjust. The like we read in Dion; neither had the Jews any Image in Jerusalem, because they thought, that God could neither be seen, nor be by any words describ'd. Diogenes speaking of Mo- ses faith, That he ordained no Images, because he did not believe God to be of humane shape. And Tactius commends the Jews for adoring one only God, and him in their minds only; and condemns them as profane, that worship the immortal and invisible God in Images made of Wood and Stone in humane fform. Plutarch also gives this as the reason, why Nunna purged the Temple from Images. Because by this it was impossible any other ways to comprehend the Deity than by the mind only. By the third Commandment we are instructed to acknowledge Gods Omnipotence, which extends to our most retired thoughts, and the care he hath of Humane Affairs: For upon this foundation are Oaths built, wherein he is invoked as a witness only, if we speak truth; but if we deceive, then as a Judge and avenger, whereby also his Justice and his Omnipotency are at once acknowledged. Lastly, That God Created the whole frame of Nature, and gave Being to all things, is confess by the fourth Commandment; in perpetual memory whereof the Sabbath was instituted, whereon he imprinted such an indelible Character of Holines, That it is more indiffensible than any other Right whatsoever: For if a man did eat of meats forbidden, or transfag- red in any other case, his punishment was left as arbitrary to the Judges; but he that violated this Right was peremptorily to die the death; because he seemed thereby to re- nounce his belief of the Worlds Creation; Abrogationem Mundi & Dei creati contirebat Sabbathi violato. As for him that wrote the Anplies to the Orthodoxy very well observes, God did therefore give a greater honour to the seventh number than to the rest, that is the memory of the World Creation ought to be preferred. Now the Creation of the World doth tacly declare both the Goodness of God, his Wisdom, his Eternity, and his Omnipo- tency; from which contemplative Notions these practical Duties will easily follow, That God is to be Honoured, Loved, Worshipp'd and Obeyed; wherefore Aristotle concludes, That he that denies that God is to be honoured, or Parents reverence'd, is not to be convinced by arguments, but by punishments. To demonstrate the truth of these contemplative Notions of God, we may draw arguments from the Nature of the Things Created, among which the most forcible is this, That some things are made, is manifest to our eye: but their...
these things that are made, if we will trace them up in their direct series, will certainly at length bring us to something that was not made, which must needs be Eternal, and that is God: but for those that are not able to comprehend the strength of this argument, it may suffice to know, That these contemplative notions of God have been affect ed unto in all ages, and in all places (some few only excepted) and by all persons, as well gentle as simple; as well by those who have been too simple and ignorant to deceive others, as by those who have been too wise to be deceived by others: which universal consent among such variety of other Laws and opinions, doth evidently witness, That this truth was delivered unto us from our first parents, and was never yet solidly confuted: and even this alone, had we no other ground to aterrain our persuasion, was enough. **Plato** argues this case thus, *Nothing made by art can come by chance; but the world's compoision is done with exquisite art, therefore it must needs be made by one, that is, the most perfect of all ARTISTS, and that is God. And hereby ariseth this first persuasion, That there is a God. Thus likewise **Tertullian** argues against **Marcion**, The first knowledge of God we derive from nature, the next by doctrine; that is, from nature we learn by his works, and by doctrine from preaching: whereupon **Cyprian** in his Book concerning the vanity of idols, concludes thus, *Hoc est summa delitii, unde agosteere quod ignorant esse non possit; This is the height of wickedness that thou wilt not acknowledge him as God, whom thou canst not deny to be so. We are all of us, though untaught, naturally persuaded that there is a God (faith Julian to **Heracleitus**) unto whom we look, unto whom we run, and towards whom (I believe) our souls do as naturally turn, as our eyes to the light, (or as the needle to the North.) Thus doth **Dionysius** ground his belief that there is a God, first upon natural reason, and then upon universal tradition. And **Plato** calls it *περάτωρ προς, An ancient persuasion*, than which nothing can be more certain. For as Aristotle faith, All men have naturally some persuasion that there is a God: of the fame opinion was **Plato**. (Now to distract from the authority of so many and so great witnesses, is not simply ignorance, but a pertinacious madness.)*

Wherefore they are not without fin, who because they are not so quick-witted, as either to aterr their notions, by arguments of their own, or to understand those framed by others, do willfully reject them; since they do both guide us unto that which is honest, and the different opinion is not built but upon a very fandy foundation. But because we are now treating of Punishments, and those only humane, we must here distinguish between their notions themselves, and the manner of differenting from them: These notions that there is a God, (one or more I here dispute not) and that he takes care of humane affairs, as they are most generally received; so are they to the establishment of Religion, whether true or false, most necessary. He that cometh to God (faith the Author to the **Heretics**) that is, *He that is religious* (for Religion amongst them, is called an access unto God) must believe that God is, and that he dispenses rewards to those that serve him. There hath been ever, and now are, faith Cicero, some Philosophers who hold that God hath no regard to the affairs of men, which if true, *Quem paress effe ietras, qua fancetas, qua religion?* faith he, What piety can there be, what holiness, what religion? Thus, faith **Epiphenus**, is the principal office of piety, to have a reverent esteem of the Gods; as namely, that they are, and that they dispole of all things with justice and righteoufness. **Alban** profeffeth that he never found any Nation, no, not amongst the Barbarians, which did wholly Apostatize unto Athiefen; but that all of them did acknowledge some Divine Power that took care of them. The first part of Divine worship, faith Seneca, is to believe that there are Gods; and then, to aspire unto them all majesty, and acknowledge their goodness, without which there can be no majesty. **Plutarch** in his vulgar conceptions faith, That if we take away providence, we darken that small light that we have of God: For, faith he, we are to conceive of God, not only as he is immortal, and in himself most blessed, but as he is most affectionate to mankind, ever watching over us to do us good. For other wise, if he will do us neither good nor hurt, faith **La夯实us**, to what end do we worship him? And indeed if we look only at the influence which these notions should have upon men's manners, it is all one to deny that there is a God, and to deny that he hath any respect to humane affairs: wherefore that, in almost all Nations that are to us known, and throughout all ages, these two notions should be thus maintained, is not arbitrary, but purely necessary. **Seneca** in his 171 Epistle, pleaded thus, *That there are Gods amongst other things, we may hence conclude, that nature herself seems to have insculpt this opinion in every man; neither is there any Nation in the World, so desperately wicked, as not to believe that there are some Gods. Neither is it possible, faith he in another place that all the World should be intoxicated with a universal madness, as to invoke, Sura nauma & Deos in efficaces, such idle Gods, as can neither hear our prayers, nor do us good. Nay **Ambition** makes it as proper for a man to acknowledge a God, as for an horse to whinny. Hence it is that **Pomponius** places Religion among the Laws of Nations; and that **Socrates** in **Xenophon** faith, *That to worship the Gods, is a Law universal, being in force amongst all people*: with whom agrees Cicero, as we may read in his first Book of the Nature of the Gods, and in his second of Invention: And **Dion Philo- eufts** calls it a persuasion both natural, and necessary to all creatures that have the use of reason. *Xenophon* like wise affirms, *That all Nations as well Greeks as Barbarians, have a held*
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Greed in this. That all things are known to the wise, without they be present, past, or to come. Now whoever first begins to erase these general notions of the Divine Providence out of men's minds, as they have in all well-governed States been defervedly punished (as we read it happened to Diogoras-Melius, and the Epicureans, who were banished out of every well-governed Common-wealth) so, I believe, they may also to be now by force restrained, in the name and behalf of humane societie; which, by this means (without any probable reason they endeavour to dissolve, And therefore Moxus the Lydian, as Diogenes relates the story, having taken the City Crambeus, drowned all the inhabitants thereof, because they neither acknowledged nor worshipped any Gods. And Homer the Sophister pleads thus against the Epicures, Daf then suffer punishment for those opinion; no, but for those impiety: It is permitted to every man to deliver his opinion; but to none, to defray Religion.

As for the other general notions as, That there are not more Gods than one, That none of these things we fee is God, not the World, not the Heavens, not the Sun, nor the Air; That the World was not from Eternity, nor the matter whereof it is composed, but rather created by God: these cannot be so easily demonstrated, nor are they universally received as the former. And therefore the knowledge of these, through the corruption of mens manners, and the looseness of the Laws (which did the Mens regard them, because, even without these there might remain some shew of Religion) have been in many places almost totally expunged. Neither did the Law of God given to the Hebrews, though it were confirmed by prophecies and miracles; and though it utterly detected and abhors the worship of false Gods, adjudge every man to death, that was convicted of such worship; but such only as by reason of some circumstances, were of dangerous consequence, as him who being a Prince or a Prophet should begin to seduce others, Deut. 13. 16. Or as that City that should begin to fit up strange Gods, as we read Deut. 12. 23. To that which worshipped the Sun, the Moon, the Stars, thereby destroy the whole Law, and forsaking the worship of the true God, Deut. 17. 2. which St. Paul expounds to be the worshipping of the creature, not the Creator (for the word πάντα as well here, as elsewhere, hath an excl usuive faculty) which was a crime punishable even among the Sons of Ejeis, as appears Job 31. 26, 27. So he that offered his Children to Molech, that is to Saturn, Lev. 20. 2. Neither did God himself adjudge the Cananites, and their neighbouring Nations to destruction, as soon as they fell to Idolatry, but punished the Execution of his wrath, till they had contracted a vast heap of sins besides their Idolatry, Gen. 15. 16. So it is laid of other Gentiles concerning their worship of false Gods, That God winked at the time of their ignorance, Act. 17. 30. It was truly laid of Philo, That every mans own Religion seems to him the best, because be judged of it, not by reason, but by affection: like those Philosophers of whom Caesar ipake, who liked no Discipline but their own. So we take our Religion not by choice, but by chance, being engaged to that of the Clime wherein we are born, before our judgments are awakened to discern truth from fallhood; as they then are rather to be pitied, than by humane Laws punished, who having received no Laws from God, nor having any knowledge of him, shall worship either the powers of Heaven, by whose grateful heat, light and influence, all things are produced, both for delight and nourishment; or the powers of any other natural causes, or of spirits, whether in Images, or in living Creatures, or in any other things. The fools of good men, who have been eminent and exemplary for virtue or such like; especially, if they did not themselves set up that worship, but received it by tradition from others, and their force could not properly be said to have forsworn the worship of the true God; for we read of Sacrifices sent to the Temple at Jerusalem from the Kings of Egypt, from Assyria and Tiberus to be offered to the true God: and though these Kings were Idolaters, yet did the Jews admit of them, as Josephus and Philo testify.) So they, on the other side, are not to be reckoned among such as are purely ignorant and erroneous, but rather among those that are impostors and obstinately wicked; who worship Devils as knowing them to be such, or the names of mens vice, or that attribute Divine Honour unto men as wicked and vicious as themselves, or that honour their false Gods with humane Sacrifices; which barbarous custom we read, was practisde by the Carthaginians, until they were compelled to leave it, by Darius the Father of Xerxes King of Persia, and by Gela the Syracusan Tyrant, who bland highly commended for it. Plutarch also gives us an account of some barbarous people, that were to have been punished by the Romans for offering humane Sacrifices; but when they pleaded for themselves the Antiquity of those Rites, they were distant without punishment, and only forbidden it for the future.

But what shall we say of that War which is undertaken against some people, for no other Cause, but because they would not embrace Christianity when proposed unto them? I do not here question whether the Religion so proposed was such as ought to have been proposed, or in such a manner as it ought to have been. We are willing to grant both: But two things are here to be considered, first, That the truth of Christian Religion, in those Points which are superadded to that Primitive Religion which is grounded upon the

XLVII.

But nor others proved by the Heb. Law.
Law of Nature, cannot be demonstrated unto any man by Arguments merely natural, because they are grounded upon matters of fact, namely, upon Chrift's resurrection, and upon those Miracles that were wrought by him and his Aposlles, which thing being matter of fact, though of old confirmed to have been done by molt irrefragable Testimonies, yet of old, so that this is a question of Fact, and that now of great Antiquity. Much more may this be questioned by such as now live to many Ages diftant from that Age wherein they were done, as well as the true of their Testimonials, which are as ancient as that, especially by thoſe who never heard of them before, nor have any of those helps either inward or outward, which are necessary to beget Faith. And therefore we fay, That Faith is not by Nature, but by Grace: and that, as God gives it, it is not as the reward of any pealing merits; for when he denies it, or gives it more sparingly, than unto us for the moft part unknown, and not at all punifiable by humane Laws. To this purpose was that Canon of the Tolentane Council made, whereby it was decreed, That no man should be inforced (thereafter) to Chriftianity: For it is faid, He will have mercy on whom he will have mercy, and whom he will heardeath. So Josephus, Every man ought to worship God willingly and freely, and not by compulsion. It is the custom of the Holy Scriptures, to attribute that to the will of God whereof no probable caufe can be affigned by men. Wherefore, since it is not in the power of man to give a reafon why fome men do believe, and others not, though both have the fame outward helps and means; hence it is that we reolve all fuch doubts in Gods will, faying, He will have mercy on whom he will have mercy, and whom he will heardeath. Neither is this the manner of the Holy Scriptures only, but it is usual with prophane Authors, who when in devout Cafes they find not reafon fufficient to inform their judgments, supply that defect with a fce vuln, Thus it seems to be. The fecth thing observable is, That Chrift the Author of the New Law did never intend that any man could be compelled to receive it by temporal punishments, and driven thereunto by the fear of them. We have not received (faith St. Paul) the Spirit of bondage to fear, Rom. 8. 15. So Heb. 2. 15. In which thing it is very true what Tertullian fays, Nova Lex non fu vindicat ulteror Cladio, The Gofft doth not call for the Sword to avenge its injuries. Ibidere speaking of Silbæus King of Spain, faith, That in the beginning of his Reign, being inflamed with a zeal for Gods Glory, though not according to knowledge, he compelled the Jews to Chriftianity by the power of the Sword, whom he ought to have won to the Faith by meek and gentle perfwafions. And for this very Caufe were the latter Kings of Spain highly blamed by Oforius and Mariana. In the Confifutions of Clement it is faid of Chrift, That he left to every man the free power of his own will, not punishing the breach of his Law with temporal death, but calling them to an account for it in the life to come. So our Blessed Lord, leaving every man to his own will, makes Proclamation openly to all, If any man will come after me, &c. And to his Aposlles, Will ye also forsake me? as leaving it to their own choice, without laying any inforcement upon their wills. And whereas in the Parable of the Great Supper it is faid, That fome were compelle to come in; it is anfwere'd, That as in that Parable the word compel argues nothing else but a vehement follicitation, fo alfo is it to be understand in the Moral of that Parable; in which fene the fame word is taken, Luke 24. 29, and not otherwile, Mat. 14. 22. Mark 6. 45. Gal. 2. 14. Procopius in his secret Hiftory tells us, That Justinian the Emperor was by many very wise men taxed for compeling the Samarites by force and menaces to Chriftianity: adding thereunto the inconveniences that was likely to arise thereupon.

But they that perfecute others for no other caufe but because they either teach or profess the Chriftian Religion, are most unreaftonable. For certainly our Chriftian Doctrine, (considered in its fincerity, without any connivance) contains nothing prejudicial to humane Society, nay that doth not rather advance it, it fhall speak for it'self, and its Enemies fhall confefs no lefs. Pliny reports of the Chriftians of his time, That they had oblige'd themfelves by oath to abftain from thefts and robberies, and not to break their faith with any man. Ammianus, speaking of our Religion faith, That it teacheth nothing but what is just and merciful. So doth Aferius, treating of Chriftian Affemblies, Wherein (faith he) nothing is heard but what exshorts to humanity, meekness, baflifulness, meftiy, and communicating of their goods to all men, as if they were all joined together by brotherly love. And it is the unified Character that the very Heathen give of it, That it is Sez a nemini molestia. A Sell of Religion offenfive to none. Zozimus, though a Pagan, gives this testimony of the Chriftian Faith, That it is a promifc and engagement to be free from all crimes, and from all impiety. So likewise Tertullian, We, faith he, are Coadjutors and Fellow-labourers with you in eftablifhing the peace of the Empire, inftructing our Aposltes that it is impoffible for any man to conceal himself from God, whether he be an evil Doer, a Thief, a Traitor, or a Jefit Perfon; as also that every man shall be adjudged to eternal either life or death, according to the merit of his deeds. Tertullian alfo observes that it was a common by-word in his time, Bonus vir Quius Seu, tantum quod Christianus, He is an honest man, only he is a Chriftian. And if it be objected, That all innovations are to be feared, especially Convencitives, and private
private Assemblies: I answer, That those Doctrines though new, are leal to be feared, that teach all things that are just and honest; but principally those that exact due obedience to Magistrates; neither should the private Assemblies of Jull and Innocent men be either even or suspected, especially of such as desire not to subvert the well, unless they are perfecuted. And here I might justly apply unto these Christian Assemblies, what Philo records that Augustus said of the Jewish Conventions, Non est Bacchanalia esse, aut carmin turbanda post, sed viarum soli; Such fuch meetings were not for reveling or for sedition, but mere Academies for Virtue: They therefore that pervert such men, and that for this only cause, may themselves justly be perfecuted. Upon this ground it was, That Conunon made War against Liemius, and other Emperors against the Persians. St. Augustine brings in Maximianus Bishop of Pagis craving aid of the Christian Emperors against the Churches Enemies, Non tam fui nifciendi causa, quam uendad Eclesie fibi creante; Not to remove his wrongs, but to defend the Church of Christ that was committed unto his care. And indeed such a War should be undertaken more for the defence of the Innocent, than to punish the Noncent.

But that they so eagerly pervert those that profess the Christian Law, only because they either doubt, or haply erre in some particulars, which either are not express in our Law, or at least not so clearly, but that it will admit of some ambiguity, and which have been otherwise understood by the Primitive Christians are unjust, as may appear, partly by what we already said, and partly by the example of the Ancient Jews, whose Religion, though strongly guarded with corporal punishments, yet did never permit them to pun- nish the Sadducees, for rejecting the Doctrine of the Resurrection; because (though more true) it was, as yet, but obliquely glanced at in their Law, and not at all taught, but covertly under types and figures. But what if the Errors be such, as among equal Judges may easily be confuted, both by the authority of the Scriptures, and by the common Testimony of the Fathers? Yet even herein we must consider how great the strength is of an over-grown Opinion; and how much a mans endeavour to defend his own Sect, doth diminish the strength and liberty of his own judgment, which as Galen faith, is malum omnis fabie infamabilis; a disease more incurable than any Leprosie: A man will sooner part with any thing than with his Opinion, faith Origen: So St. Chrysofome, An Opinion that hath taken deep root through Cufom is hardly to be removed; for there is nothing that we alter with more unwillingness than our Customs in Religion. Again, how great the fault of him is that differs from us in Opinion, must be judged by the manner and measure of his illumination, and by all dispositions of his mind, which is not possible for man to know. St. Chrysofome makes Ambition the mother of Herefie; and St. Augustine defines an Herefick to be one that either for Gain, Van-glori, or Ambition, doth either set up, or at least follow false and New Opinions; where he makes a great difference between him that is an Herefick, and him that believes and follows an Herefick: This is most apparent, that all Herefies proceed from either the Ambition or Emulation of their first Inventors, faith he that wrote the Answers to the Orthodox: And therefore St. Augustines calls it, The frenzy of a mind obstinately bent, or the height of madnefs: And yet ice, with what sweetnefs and calmnefs of spirit, the Fathers of the Primitive Church treated the Hereticks of their times. Salianus speaks thus of the Arrians, Hereticks they are, but not knowingly; to us they are Hereticks, but to themselves they are not; nay, so confident they are that they are in the right, That they brand us with that infamous name of Herefie, who are Catholicks. What they are to us, the same are we to them. We are most affaier that they disdaine the Son by making him inferior to the Father; and they as far condemn us, for disdaining the Father, in making the Son equal unto him: The Truth is on our side, yet they presume it is with them, both prind to honour God, as us they appear aunticial, but that to them seems to be the chiefift Duty of their Religion; so us they appear impious, but this they esteem to be true piety; they erre indeed in their faith, but thay do it in perfect love and charity to God; and how far punishable this Error of theirs now is, or, in the day of judgment will be, none can tell but the Judge himself: In the mean time God (I believe) doth therefore forbear them, because he deems, that though they do erre in their faith, yet this error proceeds from no other root but from the affiction to a pious Opinion. And indeed such are not to be judged Hereticks by us, who do bo no animo erre, erre through an ignorant zeal: Miferation quam odio digniores; they deserve rather our pity than our hatred; as Agathas speaks of the Superflitious Almains: For they do not go aforly, nor stumble willingly, and knowingly, they have without doubt pious intentions, but being deceived in their judgments, whatsoever they rashly apprehend for truth, they hold obstinately. Now in what measure, faith Chrysofome, such errors are to be punished, he only can without danger judge, who is the Judge of Ages, or the eternal Judge, who alone knows both the true measure of knowledge, and the proportion of Faith. Concerning the Manichees, let us hear what St. Augustines faith, who was himself once one of them: Let them rage against you, (faith he) who are ignorant, with what labour and storm a man finds out the truth; (which is but one) and how difficult it is to de-
cline errors, (which are infinite.) Let them rage against you, who know not how rare and hard a matter it is to overcome all carnal conceits, by the serenity of a pure mind: Let them rage against you, that apprehend not with what difficulty the eye of our inward man is so strengthened, as to be able to behold the beauty and splendor of its own Sun: Let them rage against you, who have not experimentally learned, how many sighs and groans it will cost before a man can attain to the knowledge of God in the least degree. Lastly, let them rage against you, who can presume that they are without errors themselves: As for me I neither can nor dare; for I ought to bear with you now, as others did formerly with me, and to treat you with as much patience, meekness and gentleness, as they did me, when I was blindly carried away with your errors. Athanasius bitterly inveighs against the Arian Heretics, because they were the first that called in the Civil Power to their assistance against their Antagonists, and that endeavoured by force, stripes and imprisonments, to draw such unto themselves, whom they could not win by the strength of arguments; Thrice plainly declaring, how little of piety and true devotion there was amongst the Professors of that Doctrine; alluding happily to that of St. Paul, Gal. 4. 29. where it is said, That, as then, he that was born of the flesh, persecuted him that was born of the Spirit, even so now. Nova & insanitia est, si praecipitatio que verberibus existit sedit; it is a new and unhoped of manner of preaching, to enforce Faith by stripes and punishments; as Gregory Bishop of Rome wrote unto the Bishop of Constantinople. And we may read of many French Bishops who were by the judgement of the Church condemned, for calling in the Civil Powers against the Priscillianists, as Subpianus Severus relates it; and of a whole Council in the East that was condemned, because they confined to the burning of Sogomoni. It was therefore wisely said of Plate, Errantis pannis eff, docteri; If there be any punishment due to error, it is to be inflicted:

**Quis nomen unquam festeri errori dedit?**

**Who ever thought it criminal to err?**

Errors in Opinion concerning the nature or worship of God, are not sufficient ground for a Juff War, but open impiety, irreverence and profaneness towards any that is but acknowledged as God, are (deferredly) in all Nations to be punished. This (amongst others) is given as one Cause of the Peloponnesian War between the Athenians and Lacedemonians, and of that War which Philip of Macedon made against the Phocians; whose sacrilege was so execrable, that as Jusine faith, Orbis viribus expauri debuit, The whole world ought to have contributed to the expiation of it. And it is St. Hierom's observation upon the sixth of Daniel, That whilst the vessels remained in the Idol Temple at Babylon, the Lord was not angry, for the error was in the understanding, and not in the will and affections, (though they erred in their Opinion concerning God, yet were those vessels employed to that use, whereunto they were primarily consecrated,) but no sooner were they made use of in a common and profane way, but the Lord breaks out into an open revenge. St. Augustine ascribes the prosperity of the Roman Empire to their care of Religion, though a false one: And Lactantius seems to justify them in part, because they had a Zeal for the Worship of God, though not according to knowledge, though they could not exactly perform their duty, yet they served him sincerely, according to the light they had of him: And (as we said before) by what God forever we forswear, the sin is punished by the True God, because we swear by it as God, faith Seneca: And it is our opinion of him that we swear by, that obligeth the True God to revenge it. And in this sense we understand that also of Seneca, The punishments of such as profane Religion may vary, but in all places they are punishable. And that also of Plate, who would have all such as scoff at Religion punished with death: In like manner they that falsely assume unto themselves the name of Prophets, are deservedly to be punished as Agathian tellfies.
CHAP. XXI.

Of the Communication of Punishments.

I. How punishments may pass to those that partake of the sin.

II. That Commonalties and their Governors are punishable for the Subjects faults, if they know of them, and do not hinder them when they both ought and may do it.

III. Likewise by receiving those who have been criminal elsewhere.

IV. Unless they either punish them, or deliver them up to be punished, illustrated by examples.

V. The Rights of Suppliants belong to the unfortunate, and not to the guilty, with its exceptions.

VI. Suppliants are to be defended till their Cause be known, and by what Law this knowledge is to be gained.

VII. How Subjects may partake of the faults of their Rulers, or the Members of the whole Body; and how their punishments differ.

VIII. How long the Right of punishing may continue against a People.

IX. Whether a punishment may be inflicted upon such as partake not of the fault.

X. A distinction between that punishment that is inflicted directly, and that which comes by consequence.

XI. That which comes by occasion of a fault, distinguished from that which is inflicted for the fault.

XII. Properly no man can be justly punished for the fault of another.

XIII. No, not the Children for the sins of their Parents.

XIV. Objections answered concerning God's DEALINGS with the Children of guilty Parents.

XV. Much less should their punishments extend to their other Relations.

XVI. Yet some things may be devised unto those which otherwise they might have; with examples.

XVII. Neither can Subjects be properly punished for the defaults of their Kings.

XVIII. Nor the dissenting part for the crimes of the major part.

XIX. The Heir is not liable to the punishment of his Ancestor as it is a punishment, and why.

XX. Yet be shall, if what was first inflicted as a punishment, do pass under another kind of debt.

So often as mention is made concerning the Communication of Punishments, either it concerns those that are Partakers of the sin, or some others. They that partake of the sin are not to properly punished for other mens sins as their own. And who they are that partake of other mens sins, may easily be understood by what hath been already said above concerning the damage that is occasioned by an injury done. For by the same ways, almoft, whereby a man is made guilty of that damage, by the same may a man be made guilty of another mans sin: and yet not always where there is an obligation to satisfy for the damage, there is the same to satisfy for the offence; but there only where there is the concurrence of some notable malignity: whereas oft-times any offence may suffice to oblige a man to satisfy for the damage given. He therefore that commands a wicked act to be done, as David did Joab concerning Uriah; he that gives his consent being required, as Saul is said to stone St. Steven, because he gave his consent unto it: for by the Law, Facientem & confentientem par pena constringit, The same punishment is due to him that commits a crime, and to him that consents to the committing of it. They that aid and assist in the act doing, they that receive or conceal the matter, or any other way participate of the crime; so St. Hierome, Not only the Thief himself, but he that knowing the thing to be false, and where it is, conceals it or does not declare his knowledge to the right Owner, is guilty. So also St. Chrysostome, Not only the perjured persons, but they that knowing of it, conceal the perjury, are guilty. They that contribute their counsel and advice, for to runs the Attick Law, He that gives his counsel to an act that is wicked, is involved in the same punishment with him that doth it. They that countenance, excourage or commend a Malefactor; so St. Chrysostome, Peor peccante qui peccatum landat, He that praiseth and applauds a wicked act, is more wicked than he that effects it. And by the Law of the Lombards, Qui facinorefam abst in horatuar, pro faciente habeatur. The By-flander that encourageth a Malefactor is equally to be punished with him. They who having full power and authority to forbid and restrain Offenders, do it not. So thought St. Chrysostome, Not they only that commit the theft, but they also that did not hinder the commission of it when it was in their power to do it. They that partake in the same manner to be punished. Just as he who hindered a wounded person from being cured, is as guilty as he that wounds him even unto death. So they who being strictly bound in Duty to help those that are oppreffed, and do it not. And they who do not disfavour when they ought to do it. And laflly, They that conceal the Fact which they are bound by some Law to make known. All these are obnoxious to
II.

How Princes and States are punishable by reason of the Acts of their Subjects.

to the same punishment, if there be in them such a malignity of Spirit as may suffice to
deferve punishment, according to what we have already said in the preceding Chapter.

This will be made clearer by examples. Where offences are but personal, there the
punishment is not to be national. No Community or other Civil Society of men may
justly be punished for the fault of some particular persons, without either committing
or omitting some fact or duty of their own, whereunto they were generally obliged.
For as Augustine well observes, in every Nation those fines which are committed by particular persons,
are to be distinguished from those that are done in common, as when the whole Body of the people
being offended do unanimously decree it to be done. Hence ariseth that Clauze usual in all Leagues,
Si defexerit publico Confido, If anything shall be done to the contrary by any publick Decree,
then shall the League be adjudged as broken. Thus the Locrins in Levy excuse themselves
to the Roman Senate, saying, That their defe抵ion proceeded from some ignorant and ill affected
people, and not by any publick Order of the Senate. And the Rhodians in the same Senate
make their defence by the same Argument, distinguishing between the publick Acts of the City,
and the private Acts of some particular persons. There is no City (lay they)
so well governed but may sometimes have some malignant Citizens sitting even at the Stern,
besides an unexperienced multitude always. And if the attempts of every private person
were ground sufficient for a just war, no City could long subsist. Thus St. Chrysostome
likewise argues, It was not the common crime of the City, but of some Strangers and Foreigners,
who do all things rather through rashness and ignorance of the Laws, than by reason.
Neither (faith he) is it just that so great a City should be destroyed for the indiscretion of
some few, nor that the innocent should equally suffer with the noetoc. So neither are the sins
of Children to be imputed to their Parents, nor Malters to be punished for the crimes
of their Servants, nor others that govern for those whom they govern, unless it be for
some delinquency of their own. Now of those ways or means whereby they that pre-
clude others may be accurious to their fins, and so involved in their punishments,
there are two of singular use, and require our strictest disputation. As first, By commi-

ience:

Cicero in Pisae.

For he that knows that such a crime will be committed, which he can hinder, and
is bound to do it, but doth it not, is guilty of that crime when it is committed. Thus
Cicero argues this Case again Cisae, It is not much material (faith he) effectually in a Confid,
whether he do himself stir up the people to sedition by his own pernicious Laws and wicked Speeches,
and so disturb the peace of the Commonwealth, or whether by his connivance he permits others
so to do. Par eit delinquere & delinquentes non prohibere, It is the same thing
(faith Agapetus to Justinian) to be wicked our selves, and to suffer others to be so when it lies
in our power to help it. He that suffers a Sinner to sin, faith Arnobius, adds unto him the
strength of confidence. Of the same opinion was Sulpian, He who having a power to prohibit
a wicked act, and doth it not, doth in effect command it. And St. Augustine likewise, He
that doth not resist and oppose himself aginst a sin when he can do it, seems to give his consent
unto it. By the Roman Laws, if a Servant did kill a man with his Malters knowledge, the
main guilt was transferred to his Malters, as if he himself had been the Murderer. Even so
he that suffers his Bond-slave to be prostituted, when he might rescue her, was by the same
Law judged the Profitutor. By the Fabian Law, if one Mans Servant with the consent of
his Malters seduced another mans Servant, the Malter of the Seducer was punished for it.
But, as I said before, it is requisite that besides the bare knowledge, there be also a power and
authority sufficient to restrain and hinder the committing of it. And this is that which the
Laws intend: for when knowledge is commanded to be punished, it is taken for connexion
or toleration; so that he shands guilty who having a power to forbid the doing of a wicked
act, doth it not. And in this Case knowledge is taken for that which hath the consent of the
will, and so it is to be understood as if the fact were committed by his advice and counsel.
And therefore as the Malter is not bound by his Servants crime, though he do know
thereof, if that Servant shall contain his Malters authority, and proclaim himself a Free-
man; and as Parents are not bound by their Childrens crimes, though they know of them,
if the Children are not under the power and tuition of their Parents; because neither
Malters nor Parents have any power and authority over them. So on the other side,
although they had power and authority over them, and so might thereby prohibit the
doing of such crimes; yet if they knew nothing of their purpose and intention to com-
mmit such acts, they cannot be punished for them. For both these mutt necessarily con-
cur to make one man guilty of another mans crime, knowledge of the sin committed,
and not restraining them when it was in their power. All which arising from natural

Whole Cities sometimes smart for th'crimes of one,
aligns this as the reason. Because having power they did not restrain him from his wickedness.
So in the Grecian Army Agamemnon and some others being subject to a General Council of war,
The Prince's errors on their Subjects fall;
That is, the Grecians were plagued for the folly of their Princes, because it was in the power of that Council to have compelled Agamemnon and the rest, to have delivered up Iphigenia to the Priest to have been sacrificed. Thus doth Cyprius expound this matter in his Fifth Book against Julian, whereupon Ovid thus:

\[\text{Virgine raptâ}
\[\text{Quan merui pacem facias, diggessim omne.}
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The Virgin gone,
All faind engag'd, though done by one alone.

Because it was in their power to have hindered it. Thus doth St. Chrysostome involve all the inhabitants of Antwerp in the crimes of the Statutes. The fall (faith he) though committed by few, we all stand accused of; and the revenge which is firstly due unto these only that did it, is threatened against us all, which we might have avoided had we before expelled the City. So might we by a timely cutting off from us those parts that were excolerated, have wife

\[\text{emendare}
\[\text{punifhment.}
\]

not perfonally involved generally.

\[\text{folve}
\[\text{offences.}
\]

power of their City, and the Lacedemonians and the Latines made before the Roman Senate, namely, That the Name of Subjects had aided their Enmies with their knowledge: But on the contrary, it was not allowed unto Tous Queen of the Illyrians, whom she pleaded that they were her Subjects, and not her felt that were the Pirates, for the of thereof and forbad them not; for it might eaily be presumed, That of what was so frequently and so publicly done, no Prince could plead ignorance. The Laurentine Embassadors being assaulted by some of King Tarius his near relations, did complain that the Law of Nations was violated; but Tarius shewing his own kindred more than common right, drew the revenge wholly upon himself. And hitherto may that of Salvin be properly applied, That Sovereign Princes who are able to prohibit the greatest crimes, do seem to approve of them if they permit them to be done. It is sufficient for private men to keep themselves upright, but they that are Princes must take care that others offend not. Non est liber a confensu quod clementate petiti, clemente negligit: He that neglects his duty in reforming abuses, doth without doubt coufent, if not approve of all, and thereby involves himself both in the fin and punishment. Id quod a multis fit necessum, ut a nemine ignoraeur: what is done by a multitude no man can be ignorant of. Polybius reproves the Etoceans sharply, because when they would not appear to be enemies to Philip, yet they suffered their Subjects openly to act against him in an hostile manner; yea, and preferred the principal actors to great Honours.

Hitherto we have wbed how they that preside over others, may be involved in their sins and punishment by toleration; now let us see how they may partake of their punishment by reception against punishments, although by the Law of nature, every innocent perchon hath a right to punish a Malefactor; yet since the infitution of civil societies, it is generally agreed, That all such particular mans crimes, that shall be committed properly against that society, should be left to them and to their Governors, either to punish or absole as themselves shall please: yet is not this Right so absolute and full as to those offences, which may do any appertain to humane society; but that other Cities, and their Governors may have the like power to prosecute them, in the same manner, as for some offences. Popular actions are usually granted in every City, much less have they that full power in such offences, whereby any City, or its Governor is peculiarly wronged: but that, that City or Governor had likewise a right, either for the vindication of his own honour, or for his future security, either to require the offender to be delivered up unto him, or to require that he be punished by that City wherein he lives, according to the injuries he hath suffered by him; and of this right, he is not to be deprived.

Seeing that it is neither usual nor safe, for one Prince to permit another to enter into his Dominions, with an Army to demand Delinquents to just punishment; therefore it is fit that the injured Prince should fend to him, under whose protection the Malefactor resides, to require that either he would punish him himself according to his merits, or to deliver him up to the pleasure of the Prince that is injured; and this is that deduction, whereof we find so frequent mention in all Histories. Thus did the rest of the Tribes require the Benamites to deliver up tho: Sons of Belial, that had abused the Levites Concubines, Judg. 20. and the Philistines Sampson, Jud. 15. Thus did the Lacedemonians make War upon the Meliennans for refusing to deliver up a man that had killed divers Lacedemonians: And at another time, for not delivering up that horse that had ravished some virgins that

\[\text{Ecces}
\[\text{were}
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Mat. I. 14.

Dios La Galba can. 4. Synod. Pisienus.

Dios Praecepta.

III.

Of receiving Malefactors into protection.

IV.

Who ought to be either punished or deliv

Eccles. 1. 8.
were sent to perform their devotions. So Cato would have had the Senate to have delivered up Cesar for the War he unjustly made upon the Germans. And the Gauls did in the like manner require the Fabii to be delivered up unto them, who had made war against them unjustly. Thus did the Romans demand from the Carthaginians, That Amilcar who had solicited the Gauls to Rebellion, should be delivered, and afterwards Hannibal as Didacus, and Livy tell us: Thus likewise they required Jugurtha of the Bocheus in these words; So shalt thou at once free us from the necessity of persecuting thee for thine error, and him for his wickedness. Thus the Athenians required from the Lacedemonians those who had besieged Lavant, adding, that unless they did deliver them, they would declare that they had broken the League. And thus did the Athenians make public proclamation, That whoever should plot any mischief against Philip, and fly for protection to Athens, should instantly be delivered up unto him; yet is it not necessary, that every person that is so demanded, should immediately be delivered up; but those only who upon due examination shall be found guilty: For as Plutarch in the Life of Romulus distinctly observes, it is not fit, neither was it, to deliver up a man unheard. The King of Scotland (as Camden informs us) told Queen Elizabeth, that he would send Fyrmunu, yea, and the Chancellor too into England, as soon as by found Evidence it was proved, that they had premeditatedly broken the peace, and committed the murthers they were charged with: Neither is every Malefactor that is found guilty necessarly to be delivered up, for the obligation being disjunctive, binds only either to deliver up or to punish. For thus we read that the Ebians made War upon the Lacedemonians, because they did not punish those Lacedemonians that had injured them; that is, because they would neither deliver them up, nor punish them: sometimes they that demand the malefactor are left to their choice, but this is a favour and not a debt, unleas it be so agreed in the league, as it was between the Kings of England and Denmark recorded by Pontanus. Thus did the Cerites put the Romans to their choice, Whether they would have the persons who had injured them delivered up or punished. And in his answer to Duathlon observes, That treating with King Philip concerning the general Peace of Greece, he told Philip amongst other things, That it was fit that the Malefactors themselves, and not their Cities should pay the price of their own wickedness; and that Cities could not justly be punished, if they caufed the Criminals personally to appear in judgment. Quintilian tells us, That the next degree to Treasons, is to harbour and protect Traitors; and next to the Renegades are those that receive them. Balsilius sent to Coeloes defiring him to deliver up unto him one, who being a Subject had taken up arms against him, being his Lord and Master; and that he would not countenance so pernicious a precedent against himself. And Dion Chrysostom among other mischiefs arising from the discord of Cities mentions this as one, That it is lawful for offenders to fly for protection from one City to another. And here we meet with another question, namely, whether they that being so delivered up be made to deliver up themselves, or remain Citizens of their own City. Whether those who being delivered up, but not received, remain Citizens of their own City.
Of the Communication of Punishments.

... that they who were through any misfortune miserable, should be preserved; but they that were maliciously wicked, should expect nothing but punishment; for these have nothing to blame Fortune for, neither ought they to aim at themselves the name of suppliants, which is proper to those only, Quibus innocens est animus irata fortuna. Whom nothing but an inevitable fate or fortune have made miserable: But as for those who are constantly and professedly unjust, there remains no place either for Pity or Protection, which two Menander thus distinguishes:

*Misfortune and injustice differ much,*

*For that's our chance, this our own choice makes such.*

Wherefore as Philo notes, Mercy indeed is due to the unfortunate, but they that are wilfully De Juret, wretched are not unhappy, but unjust. When we behold a man that is distressed, faith Marcus Antoninus, we should diligently observe his mind and manners, whereby we may discover whether it were his ignorance, or his willwishes that occasioned his misfortune, and accordingly we should administer either our advice, or our reproof. So Tostius in Procopius doth wisely distinguish between those injuries that are done through ignorance or forgetfulness, and those done out of a premeditated malice. The former may plead if not for pardon, yet for mitigation of his punishment; but the latter can urge nothing, but what aggravates both the sin and judgment. Not much impertinent to this is that of Demosthenes which Cecere thus translates, *Misereor ortem qui propter fortunam, non propter malitiam in miseriis juxta; To commiserate those that are miserable an act of humanity, but then only when their sufferings are occasioned by some misfortune, but not when occasioned by our own wickedness:* Nor that of Antiphates, That which is done involuntarily is from fortune, but what we do deliberately is but the fruits of our own choice. Nor that of Lyfias, *There is no man willingly unfortunate.* But when a man is made miserable either by the undervelved malice of an enemy, or by some secret fate, or some misfortune which could not be foreseen, then protection by foreign Princes, is a debt due to the frailty and inconstancy of our Humane Condition. It was a function of the wise Law that ever was; *That he that had accidentally slain a man whom he hated not in times past, should fly to one of the five Cities of Refuge, and there be safe.* Because that act as to the irregularity of it had not the content of the Will, so that it was not to properly his sin, as his misfortune: whereas the very Horns of the Altar could not secure him, who out of premeditated malice had slain an innocent person, or who out of an affection of Sovereignty and Dominion did attempt an innovation in the State; which Law Philo explaining, faith, *Prætanit in扇um nulium esse receptam; That no sanctuary can give protection to such unjustified persons.* The like provision we find to have been in use amongst the Ancient Grecians, as Plutarch testifies. The Codestides refused to deliver up Tyanaus to the Grecians; and the reason is given, because he had sufficiently cleared himself of the Crimes they objected against him. The like we may read of in this latter Age, for King Pepin did receive into his protection, and refused to deliver up such as being tyrannically opprest, fled out of Normandy unto him. Yea, and the Emperor Ludovicos gave to those that fled unto him, even from the Church of Rome, as may appear by his Decree made in the year 817, and inserted in the second Tome of the Gallican Councils, &c. *Cicero, Pomponius and others relate, That there was in Athens an Altar called, Ara Misericordiae, The Altar of Mercy,* which the calamitous have sacred made, faith the Poet, and a little after:

*Where th' exil'd, and the vanquish'd seek for rest,*

*And Kings of their own Kingdoms dispossess.*

That is, all that were unfortunately distress, *The City Athens, as Aristides tells us, was of all other Cities the most ready to protect strangers, and such as were through misfortune miserable.* And elsewhere, *This, is in that age was the common Port or Haven wherein all the wrecks of fortune put in and found relief, from what part of the world, and for what causes they were dispossess, bither they came, and here they found succour and protection:* The like Encomium Marinas gives of Arragon. The Gepide chose rather univerally to perish, as Lib. 20 c. 13. Procopius informs us, than to deliver up Ilidaisles either to the Romans, or to the Lombards. Sophocles in one of his Tragedies, brings in Oedipus supplanting the Athenians in these words:

*Ah! men of Athens, I have suffered much;*  
*Suffer'd indeed: for God my witness is,*  
*That knowingly, I have not done amiss.*

And Theseus answering him thus,  
*Such Guests as these, at all times to defend*  
*O Oedipus*
Of the Communication of Punishments.

BOOK II.

O Oedipus, repent I never can,
Till I forget my self to be a man.

And yet as highly as these Athenians delighted to protect their suppliants, whom fortune and not wilfulnes had made miserable, they would not protect a known malefactor, nor give that to Vice, that was due only to Innocence; witness that in the same Tragedy:

Hanc qui faccorurn confuit, nec legibus
Fident, ad aras voluitur supplex Deum,
Trahere ad tribunal nulla velitio micros:
Mala semper aquam ferre qui fecit male.

From sacred Altars, who to judgment draws
A guilty Traytor, that disturbs the Laws,
Doth nothing impious: for juft it is
That he should suffer, who hath done amifs.

So the same Poet elsewhere,

Non enim tangi decet
Manus nocente minima, at juftum fiam
Pius patere templo contra injurias.

With hands impure the Gods to supplicate
Indecent is: yet should the Temple gate
Stand open, for th' oppref t to enter at.

Lycurgus the Orator relates a story of one Calibratus, who having committed some hainous crime, and consulting the Oracle about his safety, received this answer; That if he would fly to Athens, he should have right done him. In hopes of impunity, he betakes himself to that Altar in Athens, which was held the moft facred, yet even from thence he was taken and put to death: So also was Ferdinand Lord High Chamberlain of Portugal forced from the Altar, and burnt, for ravifhing a Noble Virgin, as Mariana records: So religiously did they differlinguifh between fuch as were criminous, and fuch as were unfortunate. Tacitus condemns fome of the Grecian Cities of superflition, who thought their Gods to be pleased with their protecting of Malefactors. Princes (faith he) are like Gods; for neither do the Gods themselves answer the supplications of the wicked: and in another place, he affures us, Neque a diis nifi juflas supplicationes preces audiar, That the Gods never heard the supplications of men unlefs they were juft. Such then as are notoriously fauiful, are either to be delivered up punifhed, or at leaft banifhed out of their Dominions from whom they are demanded. Thus did the Gomai in Herodotus, who though they would not deliver up Paelys the Perfan, whom notwithstanding they durft not keep, yet chofe that which was fafelft to both, which was to fuffer him to fly to Mitylene. Thus Persus King of Macedon in his Apology to Martius, concerning thofe that had betrayed Eumenes, pleads thus, As soon as upon your information I found these men in Macedon, I commanded them forthwith to depart my Kingdom, and have for ever interdicted them my Dominions. Thus did Queen Elizabeth answer the Scots who demanded Bothwell; That fhe was ready either to deliver him up, or to banifh him out of England. Yet do the European Princes in moft places at this day, and in the age laft past, come to one another for the reception of Malefactors, unlefs they be fuch as disturb the publick peace, or that are guilty of fome egregius crimes; for lefer crimes they usually pafts by, unlefs they are direcely excepted againft in the Articles of any League: as it was in that made between England and France, where in it was agreed, That Rebels and Fugitives should be delivered up: And in that made with the Burgundians, wherein it was provided, that all fuch fhould be expelle, as Camden tells. However this is worth our observation, That notorious Thieves and Pirates, when through long and prosperous succefses, they are become formidable to their Neighbours, may be protected as from punishment; because it conduceth much to the common safety, to withdraw fuch perfons from their wicked practices, by hopes of Indemnity, in cafe it cannot otherwife be done, this therefore any Prince or People may undertake to do.

VI.

And this also is observable, that Suppliant may be defended until the equity of their cafe be rightly known. Thus Demophon tells the Ambaffadors of EURyNths, who demanded of him fome that fled unto him for protection:

Si crimen istis aliquod hospitibus strui,
Jus imperabili; vi quidem hinc non abstrahis.
If with foul crimes you can them charge, you may
What’s right obtain, but not them force away.

But if the Crimes whereof they stand accused be such, as are neither against the Laws of Nature or Nation, then shall they be judged by the Civil Law of that place from whence the Suppliants came, which AEschylus excellently proves in his Tragedy of Suppliants, where he brings in the King of the Argives bespeaking a Company of Grecians that came out of Egypt thus;

Manum tibi si immittat Aegypti genus
Quod leges partia proximos se sanguine
Dicant, quis haec objiciere fe contra velit?
Quare tuum eli docere, natalis soli
Ex legte, nullo iore te illis subjici.

VII.
How Subject sin may partake of
their Princes faults.

How the faults of Subjects, whether Natives or Strangers may be transferred to their Governors we have already seen. Now on the other side, Subjects also may partake of their Princes faults, in case they either consent thereunto, or act any thing at his Command, or by his perswasion that is wicked: but hereof we shall discoursely more properly then, when we treat of the Duty of Subjects towards their Prince. There may be also a communication of Crimes between the whole body of the people, and each particular member thereof; because as St Augustine observeth, Ubique universi, ibi & singulis, Universals cannot confess without individuals; So every single person being congregated and united in one gross body, doth confinste a body universal. But yet the faults committed by this Body Politick, are properly transferred to those particular members only, which did yield their consents unto those publick acts, and not unto those who were over-voted by the major part of the Council: And as the faults so the punishments of singular persons, are distinct from those of the whole Nation. For as upon individual persons, the greatest punishment that can be inflicted is death; so the death of a City is dissolution; which happens when the Body Politick is wholly disdiloved; that is, when all the Laws, Priviledges and other advantages thereof do utterly fail; and by this means every single person may of a Citizen become a slave; as the Thebans were to Alexander of Macedon, those only excepted that contradicted the decree of disdiloving the Society. So also a City or a Kingdom may be reduced into a civil servitude, by being made a Province. And every particular person may lose his propriety by confiscation; and whatsoever that City or People held in common, as their Walls, their Magazines, their Ports, Men of War, Fleets, Elephants, Treafuries, yea, and their Common Fields, all become the Conquerours. But for private men to lose their particular Estates, through the defaults of the univerfality, without any consent of theirs, is unjust, as Libanus very well obferves in his Oration concerning the Antiochian Sedition. The fame Author approves the fact of Theodosius, for punishing a common fault, with the los of their publick Theatres, Baths, and the honour of being a Metropolis; which St Chrysologue also confirms in his seventeenth Oration de Statuis. After the very fame manner were the fame Antiochians of old, punished by M. Antoninus the Philofopher, &c.

But here we meet with a notable question, whether the punishment due for an injury done by the generality of any one City or State, may at any time afterwards be exacted: So long as that State, City or Commonwealth doth subsist, it may: for that which is justly due at all times, may at any time be exacted, because the fame body politick still remains, though the individuals fucceed each to other, as we have elsewhere showed. But yet on the other side we must note, That fome things are primarily and absolutely neceffary to every Corporation, as to have a publick Treasury, to have Laws, and the like; others appertain thereunto derivatively only, from those individual persons that inhabit therein: In which fene a Nation or City may be faid to be fuilt, valiant, prudent, if most or many of the Inhabitants thereof be fuch; and of this kind are the merits of a City. For that which hath no life, cannot of it felf contrafct any guilt, but a City is faid to be guilty, in refpeft of thofe particular persons who actually offended; but they being dead, by whom the guilt was deduced to the generality of the People, the guilt dies alfo, and confequently the obligation to the punishment, which without merit cannot confit. Thus Libanus in his fore-cited Oration, There is no place left for revenge, where all are dead that gave the offence. Wherefore Alexander is highly condemned by Arranmus, for his too much cruelty and injustice in his revenge taken upon the Persians, there being no one person then living of those that had formerly offended the Grecians. And therefore Julian ascribes that War to another cause, There was never any War, faith he, reputed just, conftantii law, that was undertaken for such a cause, neither by the Grecians against the Trojans, nor by the Athenians.

VIII.
Whether a puni-
ishment once
due may any
time be exact-
ed.

Mae-
Macedonians against the Persians, as may be made clear to any child; for they never visited crimes ancie ntly committed by Parents, or their Neighbors or Children; but invaded those only, who had by force oppressed the povertie of such as had well defended, and disposed of the weak. Concerning the destruction of the Branchidæ made by the same Alexander, Curtius gives his judgment thus, If (faith he) the same punishment had been inflicted upon the Traitors themselves, it had been recorded as an act of his justice, and not of his cruelty; but the revenge fell upon the innocents, whilst their povertie (which never so much as saw Miletum, and therefore could not betray it to Xerxes) pay the price of their forfathers sin. The like judgment doth Arrianis pas upon Alexander's burning of Persepolis, in revenge for what the Persians had long before done unto the City of Athens. But, faith Arrianis, In mine opinion, it was not wisely done of Alexander; neither could that be truly said to be a just revenge upon those Persians, who had been dead long before. For as to that answer which Agathocles made to the Just complaints of the Inhabitants of Thessalonica, namely, that the Sicilians had of old suffered much more by their Countryman Xerxes, none that hears of it but will think it ridiculous. And Plutarch in his Book against Herodotus, faith, That it was a thing very improbable that the Coriuthians should revenge an injury done them by the Samians after three ages. From all which we may conclude, That the memory of injuries done us, ought not to outlive the perfons that did them; neither will those arguments brought by Plutarch, in defence of the revenge taken by God upon Povertie for the sins of their Ancestors, serve to justify the like in men; because, there is not the same right between man and man, as there is between God and man: neither will it necessarily follow, that because our Children do receive honours and rewards, for the virtuous acts of their forfathers, therefore they may be justly punished for their faults; because such is the nature of a courteiie, or benefit, that it may be conferred upon any man without injury; but the nature of a punishment is not fo.

Thus having thew by what means a man may partake of the punishment by being made accesary to the sin of another; now we intend to shew how a man may be involved in the punishment, though he be no ways accesary to his sin: And here to avoid mistake, and that we may not confound things in their own nature distinct, because they are alike in name, we must walk cautiously as to some particulars.

As in the first place, we must distingiuish between that damage which is purposely and directly done, and that which comes by consequence; that I account a wrong directly done, when that is taken away, whereunto a man hath a peculiar right: And that I call a wrong done by consequence, when a man is deprived of that, which otherwise he might have had, that condition ceasing without which he could have no right or title. An example whereof Ulpian gives us thus, If by digging a Well in my own ground, I cut off or intercept the spring that feeds my neighbours Well; the damage he sustains, is not occasioned directly, by any illegal act of mine, but by the lawful use of that wherein I had a proper and peculiar right as being mine own. And in another place, There is a great difference between the doing of an injury, and the prohibiting a man to make the profit, which he hath hitherto been permitted to make. And it is very proper (faith Paulinus the Lawyer) to account our felices rich before we have acquired those riches. As when a Father runneth into a praemunire by doing that, for which his effe is justly confiscate, his Children may feel the loss, 'tis true; but the loss is not properly their punishment, because the goods could not properly be accounted theirs, unlefs they had continued to have been their Fathers to the hour of his death; which was well observed by Alphonsus, when he said, The Children indeed do suffer through the default of their Father, but that they do not inherit it which should otherwise have descended unto them, is not properly the Childrens punishment, but their Parents: But those goods which accrue unto them, not from their Parents, but either from nature, custum, or education, do (notwithstanding their Fathers fault) remain perfectly theirs. Cicero writes that Themistocles his Children suffered want; nor did he think it unjust, that Lepidus his Children should do the like: and this he affirms to be an ancient custum, and observed in all Cities; which notwithstanding the Laced Roman Laws have somewhat moderated. So when through the default of the major part, which (as we have said before) repreffent and hath the power of the whole, the whole offends, and upon that account loseth their civil liberty (i.e.) their Walls, Ports, and other Commodities; those particular persons who were innocent, do indeed bear an equal share in the los, but yet in those things only which appertained not unto them, but as they were a part of the whole.

Besides it is to be noted, that sometimes some evil is to be impos'd on a man, or some good taken from him by the occasion of another's sin; yet to that that sin is not the immediate cause of that action, as to the very Right of doing it; as he that paieth his word for the debt of another, suffereth, not by reason of the debt, but by reason of his ingageinent, according to our Proverb, A Surety is a sure tye. For as he that paieth his word for a buyer, is not bound by the purchase, but by his own free promise: So he that undertakes for a delinquent may suffer, not for his delinquency, but by reason of his vadimony or suspicion, which
which as it was in his own free power to do or not to do; so being done, it shall no less oblige him than the offence did the delinquent. Now the ground of this is, the power and freedom that every man hath to oblige himself, and therefore the measure of his sufferings is not to be taken from the hainousness of another's fault, but from the power he hath to oblige himself: The consequence whereof is, That no man can justly be put to death, by being a surety for another, (whose crime may happily deserve death) because no man can justly oblige himself beyond what is in his power, but this power over a mans life, either to take it away from himself, or to oblige another to take it away from him, no man hath: and therefore no man can justly be put to death by reason of such a vade-mono. And this I hold to be the truer opinion, though it seems, that not the ancient Romans only, but the Greeks and Hebrews also were of another mind, who believed that even the forgiveness also might justly be adjudged to death, as appears by that ancient story of Damof and Sythas. And by those words of Reuben to his Father Jacob, Slay my two sons if I bring him not back unto thee: whereunto St Augustine * adds, where he faith, That he that is the cause of another's death, is sometimes a greater sinner than he that kills him: As when a malefactor leaves his surety to suffer that lawful punishment which himself should undergo; as it falls out frequently with hostages, as we shall shew anon. Neither doth this power of obliging a man itself extend to mutilation; for no man hath such a power over his bodily members as to cut them off, unless it be for the conservation of the whole body. But whatsoever any man hath a full and absolute power over, he may engage for another, and if he suffer thereby, it is not by way of punishment, but by way of equity, which requires that what is promised should be performed. Thus a man may forfeit his estate, his liberty, his goods, and the like. The same almost may be said of such things as a man enjoys, either jus praecario, by entreaty or permission, respec't being had to the propriety of the thing: Or in his own private right, respect being had to that Sovereign Right that every City or State hath over it, for the publick and general safety. Now if any of these shall be taken away by the occasion of another man's crime, it is not (as I have said before) properly as a punishment; but as the execution of that precedent right, which by promise was transferred to him that takes it. So when that Bealt is put to death with whom a man hath had copulation, (as by the Law of Moses was decreed,) it was not by way of punishment: forasmuch as a Bealt having no Law, cannot be freed properly to sin, and consequently is not liable to punishment; but it is by virtue of that Right and Dominion that men have over Beasts, to do with them as they please.

These distinctions being granted, we say, that no innocent person can be punished for the default of another; the reason whereof is, Because every punishment presupposeth an offence, and every offence muft needs be personal, because it ariseth from the choice of the will; and nothing can be more truly and properly ours, than that which derives its being from us.

It was St Hierom's observation, That Negque virtutes, neque vitia parentum liberis imputari; That neither the virtues nor vices of Parents are imputed unto their Children: And St Augustine concludes peremptorily, That it stands not with the perfection of God's justice to punish an innocent. Dion Chrysfome when he had said, That by the Athenian Laws, the Children were sometimes put to death for their Parents crimes, speaking of the Law of God; he subjoyns, But this Law doth not like the other, punish the pofterity of those that sin; but makes every man to be the author of his own misery; according to that common Proverb, Nofa fciuitur caput. The punishment follows the malefactor only. We do Decree (say the Christian Emperors) That where the guilt is, there shall be the punishment: for sin, like a viper, devours its own parents; and therefore our fears should not be extended farther than our guilt. Quis locus innocenties relinquatur, si alienum crimen maculat referentem? Where, faith St Augustine, shall innocence find sanctuary, if the child that is ignorant and innocent must be involved in his father's punishment? Philo in his Special Laws, abomining the curtail of some Nations, in destroying the Children of Traytors and Tyrants, faith, fide humana esse paras carum facti delicta; It is just that they should suffer that have sinned: And in another place, There is nothing (faith he) more unjust, or of more dangerous consequence to a State, than to deny either the virtuous children of wicked parents their deserved honour, or the wicked children of virtuous parents their due punishment: For the Law judgeth every man according to his own works, and neither commends any man for the virtues, nor condemns any man for the vices of his ancestors. And Josephus condemns the contrary fact in Alexander the King of the Jews, calling it, The excitation of punishment exceeding all humane measure. So also doth Dionysius Halicarnassensis, where he confutes that common precept of cruelty, which is that malus corvus malum ovum, the child will be like the father: For this alio (faith he) is very uncertain, and an uncertain fear can be no ground sufficient to justify a certain death. One was so bold as to tell Arcadius, (a Christian Emperor) that the children should also attend their guilty parents to death, if it should happen to be inflicted by their example. And Ammi anus relates a story of a Daughter, at that time very
very little, that was put to death, *Ne ad parentem exempla succurrere, lest she should grow
to be like her parents*. Neither is the fear of revenge any just cause to destroy the chil-
dren of guilty parents, which occasioned that Greek Proverb;

> Who kills the Sire and sages the Son's, a fool.

For, as Seneca notes, *There is nothing more unrighteous than for a child to inherit his fathers
malice*. Pauflanias the Greek Emperour would not do the least hurt to the Children of Ach-
tagni, who had caused the Thibans to revolt unto the Medes, presuming that they were
not guilty of that conspiracy. And M. Anthony, in his Epible to the Roman Senate, com-
manded them to pardon the Sons of Avidius Callius, (who had confpired against him) to-
gether with his Son-in Law, and his Wife, adding; But what speak I of pardoning them, who
have done no evil. And Julian highly commends the like humanity in Constanfius, hew-
ing, That good Children do many times spring from wicked Parents, as Bees out of rocks,
figs out of bitter wood, and Pomegranets from thorns.

But God in the Mosaical Law threatens to visit the sins of Fathers upon their Children;
but he hath a full and absolute Power and Dominion, not only over our goods but lives
also, as being his own gifts, which he may take away from us at any time, and that with-
out any other cause given, than his own will. If therefore he do at any time by some
violent and untimely death snatch away the children of an Achan, Saul, Jeshobam, Abah,
or the like, he doth but exercise his own right of Dominion, and not that of punishment;
and yet by the same effect, he doth the more exquisitely punish the parents of those chil-
dren, as some of the Jewish Doctors taught very truly. For whether the parents do sur-
vive their children, which the Divine Law did chiefly respect, and therefore extends not
its threats beyond the fourth generation, which was possible for a man to see, Exod. 25.
most certain it is, that the Parents were even therein intended to be more severely pun-
ished by so sad an example, as being thereby more deeply wounded than by their own
sufferings, as Chryfollasme well observes: whereas agrees that of Plutarch, *Nullam daturus
sapplicium quam eas qui ex se sunt ob se miferos spectare; No punishment so grievous as to see
those born of us, to be for our faults miserable*. Or, whether the parents do not live so long
as to see their childrens sufferings, yet doth he who governed this life in that fear be a
mold dreadfull torment. *The hardness of mens hearts (false Tertullian) did urge the Almighty
to this severity, that so they that had any care of the welfare of their posterity, might yield
the more ready obedience to the Law of God.* Whereunto we may add that of Alexander in Car-
tius, who being demanded what should become of their innocent children? Answered, It
is not for you to know what I intend to do with them, that you your selves may perish the more un-
comfortably. But withal we must note, That God doth not use this severity, for but few
sins, as are committed properly in the reproach of himself; as for the sins of Idolatry,Sacri-
ledge, Perjury, and the like. Neither did the Grecians themselves think other wise. For
all those sins which were thus visited on posterity, which they called stupendius, were
of this fort, whereof Plutarch difcourageth excellently in his Book, concerning the late
revenge of God. And in *Aelian* we find a Delphic Oracle to this very purpose denounced
against the sin of Sacrilege:

> At sequerum fontes divinum perfugitur jns,
Necpote vitari: non igitur ab Jove ducant:
Sed capit iporum: etsi nateemer ab ipsee
Imminet: tinge dome cladem jubit altera clades.

Vengeance, the guilty doth from Heaven attend,
Which none can escape, though they from Jove descend,
Upon themselves, and on their Children all
Plague after Plague, throughout the house shall fall.

The like we have in *Libanius*, who speaking of some Sacrilegious persons, faith, *Where-
of some have already been punished, others not yet, but none shall escape; and not only they, but
their Children Children after them*. This is also confirmed by *Strabo* and *Gellius*, in the sto-
ry of the Gold fohn out of Temple at Thulost. Concerning Perjury we have already gi-
ven the like testimonies above; and concerning Idolatry we have a most pregnant example
in *Jeroboam*, where it is also to be observed, That although God doth thus threaten to visit
the sins of Parents upon their Children; yet he doth not always do it, especially if any
spark of vertue appear in them, or if the Child do publicly declare his detestation of his
Fathers wickedness, as *Andren Pedagogus* did; as is evident, *Exod. 18.* and by divers ex-
amples alluded by *Plutarch*, in the place before recited. And in the New Testament,
where there is a clearer discovery made of the punishments that attend us after this life,
than in any of the Prophets; yet is there no commination that extends beyond the perfon
sinning,
thereunto that of Ezekiel hath some respect, though but obliquely, as the manner of the Prophets at that time was. Now though God do sometimes visit the sins of Parents on their Children, yet is this no warrant for us to do the same; neither can there be the same reason, because of that absolute Power and Dominion, that he hath over our lives, to take them away at his pleasure, without any respect had unto our sins; whereas men can have no such power, but what our own crimes give them: and therefore as the sin, so the punishment should not be extended beyond our persons. And therefore the very fame Law of God doth expressly in another place forbid, That either the Father should be put to death for the Child, or the Child for the Father, Deut. 24. 16. which some of the pious Kings of Israel did religiously observe, even in the case of Trehon, as Amos 8. 15. which Law is highly commended both by Josephus and Philo: As Iosephus both the like Law amongst the Egyptians, and Diodorus Siculus observes the same amongst the Romans. Neither the sin nor punishment of the Father leaves any guilt at all upon the Children, faith Calistius out of Plato. For it is just that every Fox should pay his own skin unto the fker, and that every man should carve out his own fortunes, and no man answer for his sin before God by an Attorney. Would any City (faith Cicero) endure such a Law, that should condemn the Son or Neighbour, if the Father only or the Grandfather did offend? Hence it is that the Roman, Grecian, and Egyptian Laws do forbid the putting to death of Women with Child, as an act of injustice and cruelty.

And if so, then certainly the Laws of the * Persians and Macedonians, adjudging to death all the kindred and relations of Traitors, that fo they might the more dolorously perish, (as Curtius speaks) are most cruel and unjust, which Annianus Marcellinus records as the feverest of all Laws. Philo also observes, that it was usual with Tyrants to put to death together with the perfons condemned, the confined Families that were of nearcst kin to them; which execrable custom is not so much as heard of among Chrislians, being a cruelty exceeding any humane Judgment.

But yet in cafe the Children of such Traitors may have, or expect to enjoy any thing whereof the peculiar Right is not in them, but in the King or People, it may be taken from them by a certain Right of Dominin, as it does to the punishment of the offender. Hence it was that (as Plutarch observes) The poverty of Traitors were held incapable of honours, as the Children of such as were proscribed by Sylla were amongst the Romans. So by the Law of Areopagis, it was provided (as a thing tolerable) against the Children of Traitors, That they should not be admitted into any honour or office in the Commonwealth.

Now what hath been here said of Children, may as well be said of such people as are truly Subjects; if the Question be put, whether they may be justly punished for the sins of their Kings or of their Governours? I mean not here, in cafe the people have to give their content thereunto, or act any thing in relation to the fault of their Prince, which is in it self punifhable. But we treat of that contract, which ariseth from the nature of that body, whereof the King is the Head, and the Subjects the Members: For as to thefe that give their content and afliniance to the fin of their Prince, it is true what Philo observes of Pheraoh in Abraham's time, That the whole Family felt the fmit of Pheraoh's fin, because no man had indignation against; so unjust a fmit, but all of them by commending it, were as guilty almost as himself. So Iosephus discharging of the judgment of Jeroboam, The people, faith I, did likewise partake of the punishment of the Kings fin, for they also were to be expelled that good land, and to be scattered to foreign Nations, because they were his companions in all the fin of his. But in cafe the people yield not their content, yet may they partake of the punishment, by reason (as I faid) of the connection that is between them and their Prince. David numbered the people, and his Subjects are consumed by the Peftilence; David thought this to be hard dealing, because he thought the people innocent: But God (faith the Text) was angry with the people, and therefore moved him (against them) to fay, go, number the people, 2 Sam. 24. 1. And then takes occasion of this fin of David's, to punifh the fins of Israel; and having ablution of power over their lives, takes them away by the Peftilence, thereby punishing both Prince and People: for, as a good Christian Author faith well, Kings are never more severely punished, than when they are punished in their Subjects. And this is as just with God, as it is with men, ordinarily to be whipt on the back, for an offence committed by the hand; or as it is with a Physician, to burn a man on the great Toe, to cure him of a pain in the hip, as Plutarch makes the comparifon: But why this is not lawful for men, we have already liewed.

The felf fame may be faid of the punishment of fuch particular perffons (in thofe things which are properly their own) as do not content unto those injuries that are committed by the generality of the people. But why the Heir that is obnoxious to other debts, is not ob<lienced to this of punishment, the true caufe is, Because the Heir represents the perfon of the deceased, not in merits, which are meerly perfonal, but in his goods; whereunto that Heir that are owing unto any man, by reafon of the very inequality of things, should cohere, was at the first, by a general
Of the Causes of War that are unjust.  

BOOK II.

CHAP. XXII.

Of Causes of War that are unjust.

I. The difference between Causes that are just, and such as are unjustly, explained.

II. The War that hath neither of these, is brutish.

III. That War that hath causes unjustly only, not justifying, is preteritory.

IV. There are some causes which seem to be just, which are not.

V. As uncertain fear.

VI. Profit without necessity.

VII. The denial of Right, where there are plenty of Women.

VIII. The desire to plant in a better soil.

IX. The finding out of such things as are pre-occupied by others.

X. What if those pre-occupiers be altogether mad.

XI. The desire of liberty no just cause, in such as are Subjects.

XII. Nor the desire to rule over others without their consent, though for their good.

XIII. Nor the title of being Universal Monarch, which none have given to the Emperor, which is refused.

XIV. Which others give to the Church, which is also refuted.

XV. As also a pretence to fulfill some Prophecies, without a special command from God.

XVI. As also a pretence of some due debt, though not in strictness of Right but some other way.

XVII. The difference between a War whose cause is unjust, and that which is some other ways unjust, and the divers effects of both.

Of the causes of War, some are (as I have said above *) justifying, some unjustly only; those that are unjust, have notwithstanding always some fpecious pretence or other, to make the War to appear just, which Polybius calls προετοιμασία, the other he calls ἀπερίτας, or the true causes, which oft-times lie couchant, whilist something that is more plausible is expos'd to the publick view; as in the War which Alexander made against Diarius, the preface or pretence was, to revenge some wrongs which the Persians had long before done unto the Grecians; but the true cause was Ambition, and a vehement thirst after sovereignty and riches, which also was very much heightened by the facility of the enterprise, which he collected from the succes, which both Xenophon and Agesilas had before in their several expeditions.* Thucydides distinguieth them into the outward flew, and the inward truth; as when the Athenians made War against Sicily, they openly declared, that it was only to aid the Agesilas, but the naked truth was to gain Sicily to themselves. Appian also hath the very same expre'ssion, in the War made between the Romans and Mitridates; and also in his fifth Book of their Civil War, where speaking of the peace broken between Otahius and Sextus Pompeius he faith, That there were some causes which were true but latent, and others that were feigned and pretended only; the one was but as a cloak or vizard, the other was the real purpose and intention. It is true what Procopius in his Persiai War faith, Statum ei non liber eque lat, ubi justitia dux eft, coms uti sitatis; It is but folly to dissemble, where justice is our guide, and profit our companion. The pretence of the second Punic War was a contell about Saguntum; but the true cause was, the Secess difficulty which the Carthaginians had against the Romans for the hard conditions they had imposed on them in the low ebb of their fortunes; and the great confidence they laid in their own strength, upon some prosperous successes, they then had in Spain, as Polybius observes. The fame distinction we find used by Livy, in the Oration made by the Campanians to the Romans, concerning their engagement against the Sammites, which they pretended to be only to afflict the Sedecines, but their main end was their own defence; because they forefaw, that when their neighbours house was burnt, the fire would quickly reach them.
Of the Causes of War that are unjust.

So when Antiochus made War against the Romans, his pretence was to revenge the death of Barcilla, and some other wrongs received; but the true cause was the great hopes he had to make some advantage to himself of the looseness of the Roman Discipline. And Plutarch observes, that when Cicero objected against Anthony, that he was the cause of the Civil War, it was but a pretence; for Cesar resolving to make War, took only his pretence from Anthony.

Some there are that are carried head-long into War without either of these causes, _Pecculorum proper se avida_; that delight only in sweat and blood, and that live wholly upon spoil and rapine. This is a vice so much beneath the nature of mankind, that Aristotile calls it _sensulcia_, a savage frenzy proper to wild beasts only: And so doth Seneca, _Non crudelitate_ fen. _fed feritate dicimus_; We cannot so properly call it cruelty, as a kind of savage fierceness to delight in blood: We may so call it madness, whereas as there are divers kinds, to be there divers symptoms, but none more certain than that which delights in humane slaughter. Wherewith agrees that of Aristotile, _He is cruel with a worse_, who is so far transported with a thirst after humane blood, that he makes no difference between friends and foes. And that also of Dion Plutarchus, _To engage one's self in unnecessary War_, and to rush into battle without any provocation, is a mere madness. So likewise faith Seneca, _There are few or none so savage, as to shed humane blood prodigiously, and that for bloody sake only._

Most men that make War have some Causes that move them thereto, some whereof have matter sufficient to justify them, others none at all. Of this latter fort was that War made by the Heruli against the Lombards, a War without any pretence whatsoever. And such were the Wars made by the Gauls, as Livy testifyes; who thought the best right to confit in their Arms, and that the longest sword might take all. But in the account of the Roman Laws, _Quo rogant de possidenti causa, nullam aliam adfect, quam quod possidenter pratait eff_; He who being demanded by what right he held any thing, could show none, but that having got it he would keep it, was held to be a Thief, a Pyrate, or an Usurer of another man's Right. So Aristotile of such as excite others to War, faith, That they regard not at all whether to subdue their innocent neighbours be just or not. Such a one was Brennus, who held, _That he had the best Right to All_, who was stronger of All: Such a one Sisin thought Annibal to be,

--- pro seadere, proque

_THREADS WHITE:

Whole Sword did awe
Both Leagues and Law.

And such was Atilla, and all those who look not at the Cause but at the success of Wars, according to that vulgar saying of most Souldiers:

---_Quem victor nisi exitus,

Non causa._

'Tis not the Cause, but th' End that crowns the War.

For when once the dispute comes to blows, the vanquished Party cannot by the strength of Argument convince the Conqueror that he is in an error, nor shall Reason be heard when the Sword hath decided the Quarrel:

--- Hec acies victum facturum noncentem eff:

This battle will the vanqu'dt, guilty make.
--- For let the Cause be what it will,
The conquer'd party must be guilty fill.

Whereunto that of St. Augustine may very fitly be applieed, To invade the Dominions of our neighbour Princes, and being encouraged by success to proceed by force of Arms to waste their Countries, and out of mere ambition to destroy those who never invaded us: _Quid aliud nisi grande Latrunculum nominandum eff? What can we call this but a grand robbery? Of such Wars as these thus speakes Velleius, That they are made for no other cause, but for pay and plunder: So thought Cicero also, That pride and haughtiness of spirit, whereby we confront dangers, and endure all manner of hardship, is no part of true valour if justice be wanting. To the same purpose speakes Barcilla, They who being transported either with an infatiable desire of Rule or of Riches, or by a violent hatred, shall without any other cause invade another man's Dominions, forsooth as they offend those that are inoffensive, these men, faith he,
he, are both proud and dishonest. Of the same mind was Andronicus Rhodius, They who to enrich themselves, do rob others, are accounted wicked, impious and unjust, and such are Tyrians, and they who for plunder make Cities desolate. Concerning whom, Philo upon the Decalogue writes thus: They that have get the power of Thieves and Robbers, that spoil whole Cities being secured from punishment by being above the Laws; these are men of a barbarous nature, ambitious of rule and dominion, committing great robberies, yet cloaking their villanies under the specious names of Magnificence and Empire, which may more properly be called notorious Villanies. For to waste and depopulate Countries, being by no injury provoked, is brutish cruelty.

Others there are that pretend to make War upon just and warrantable grounds, which notwithstanding being thoroughly searched into, will be found unjust; and as Lewis speaks, A contet not to be decided by Law or justice, but by plain force. Some Princes (faith Plutarch) make the same use of Peace and War, as private men do of Money; not always for just ends, but for ends suitable to their own fancies. Now tho’what causes are unjust may be in some measure known, by those that are just, Reelium enim est obiqui judex; for by a line that is straight, we may easily discern that which is crooked; yet for plainness and perspicuousness, we shall inluit upon the principal heads of them. And Firth, Our fears by reason of the swelling power of our neighbour Prince, is no sufficient ground for a just War; for that our defence by Arms be just, it ought to be necessa-

That which it cannot be unlefs we are most allured, not only, that he against whom we make War, hath a power to do us wrong; but that he hath also a full purpose and resolution so to do, which certainly ought to be such as takes place in moral matters. That therefore our Neighbour, being not restrained by any former agreement, builds a Fort in any part of his own Dominions, from whence we may be hereafter annoyed, is no just ground for us to make War upon him; because, for prevention we also may do the like in any part of our own Territories, or apply our selves to other the like remedies, and not by War. Whence we may conclude, That the War made by the Romans against Philip of Macedon, and that made by Lyfmachus against Demetrius, were unjust, unlefs warranted by the acceds of some other cause. I am very well satisfied with that of Tacitus, concerning the Cunci, the noblest People of all Germany, Who (faith he) supported their grandeur by justice, without any extraordinary affectation, either of glory, or riches, and yet without any disability or want of power to either: they lived quietly and without noise, provoked no Wars, nor were they wafted by spoil or pillage; and which was the main demonstration of their valour and strength, the credit and esteem they had before others, they got not by injuries and oppressions: every man amongst them had his Arms in readiness, and at occasion required they had an Army, both of Men and Horses they had good lawfure, and thus they kept up the repute of being a warlike Nation, though they lived in Peace.

Neither hath profit the fame right to make a just War, as necessity hath. Neither is the denial of Marriages, though there be plenty of Women, any just cause of a War; which notwithstanding Hercules made the ground of his War against Eurytus, who denied him his Daughter Iole in Marriage; as Darius also did, of his War against the Scythians.

Nor is the desire of poifling a more fruitful or more healthful foil, as it is usual for such as inhabit Fenns or Delerts, any just cause of making War, which was the case of the Ancient Germans, as Tacitus records *.

Neither is it sufficient to justify a War, to pretend that we were the first discoverers of any place; in case it be poifled, though by Pagans and Infidels, or by men of dull apprehension: For, * Inventio est corum, que nullius iust; To entice our selves to be the first founders, it is necessary that the land so found shou'd belong to none.

* Vita de Ind.Rat. B. 1. n. 31.
Neither is it necessary to Propriety or Dominium, That a man should be endued with Virtues either Moral or Theological, or to be of a quick understanding; yet may this seem to be justifiable, That in case there can be found a people that have no use of Natural Reason at all, there all Right and Dominion may be taken from them: Yet ought we in charity to make such an allowance as is necessary for their support and maintenance, as well as unto other ideots and madmen. For as to what we have already said, concerning the care which the Law of Nations takes to preserve the property of infants and lunatics, it appertains to such people with whom we have any commerce, or make any contracts with, which we cannot have with such a people as are wholly and altogether destitute of Reason; and therefore of these I may very well doubt whether they have any property at all. The Grecians then were very unjust, in concluding the Barbarians to be naturally their enemies, because they differed from them in manners, and were not so quick of understanding as themselves. But how far forth a Mans Right and Property may be taken away for some hairns crimes committed against Nature, or Humane Society, is another question, whereof we have already treated, where we discouf the Right of Punishments.

Neither is it a just cause for any people or perfons to take Arms to endeavour to recover their Liberty being lost; as if it did naturally and always belong unto them. For when we say that Men or Cities are naturally free, we mean, that they are so by that Right of Nature, which precedes all Humane Constitutions: In which sense Liberty is taken only for a privation of Slavery, but not as it is contraditory to Servitude: so that though by Nature no Man be a Servant, yet no man hath by Nature this privilege, that he can never be made fo; for in this sense no man is free. And thus is that of Albatius to be understood, Nemo natura servus est, nemo liber, hoc postea nomina fingulis impofit fortuna: To be born either Bond or Free, are the badges of Fortune, and not of Nature. So Aristotle, It is the Law that makes any man either a free-man or a Servant. And therefore into what Estate foever Fortune hath call'd us, be it of Freedom, or of Julflitution, and what ever Personal or Civil, we ought therewith to be content, and in no wise to struggle, or repine against it, according to the advice of the Apostle; Art thou called to be a servant? Love what is so.

Neither is it lawful for any man by force of Arms to reduce those under his Government, who deferve to be enlaved, or as Philosophers fay, are naturally slaves. For although it be expedient for them to be well governed, yet this gives no right to any man to compel them thereunto by Force and Arms: for to fuch as have the use of Reason, the choice of things profitable and unprofitable, should be left free to themselves, unless fome one hath already got the Dominion over them. But as to Infants it is clear by another cafe, for feeing that it is not permitted unto them freely to dispose of their own actions, or to exercise the Right which belongeth unto them, by reason of the defect or immaturity of their judgments, therefore they are committed to fit Guardians and Tutors.

And here I should hardly mention that absurd Title, which fome have given unto the Roman Emperor, as if the Right of Empire over the remotest, and as yet unknown parts of the World were already invested in him; but that I find Barbus (whofe for a while was admired as the Prince of Civilians) fo daring, as to pronounce that man an Heretick that should deny it: namely, because as well the Roman Emperours have oftentimes fliewd themselves Lords of the world; (as by the Council of Chalcedon it may appear) as also, because in the sacred story, that Empire (which later writers call Romanis) is by way of Eminency mentioned by the name Tu dominus, of the world: as indeed many such hyperbolical expressions we shall meet with, not only amongst Poets, as

Orbenjam rotam vi/is or Romanus habeat;

The conquering Romans held the World in awe:

and the like; which Empire, though it contained not the sixth part of the then known world, yet becaufe it was the greateft and most eminent Empire in the world at that time, it was by way of excellency Riled the Empire of the world. Thus Philo, I fpeak, faith he, of many, and thofe the most profitables parts of the earth, which a man may (by way of eminence) call the world, as it is bounded between thofe two great Rivers, that of Euphrates, and this of the Rhine: But even in the holy Scriptures, as when Judea only is by the like way of eminency called the whole earth; and Jerusalem faid to be feated in the midft of the earth, (i.e. of Judea. For as St Hierome well observes, Nomen terrae, utiam addita particular, omnis, reftringe defer ad eam regionem de qua sermo effe. This word, the Earth, though this particle, All, be added unto it, ought to be refrained to the Country whereof we difcours: So all the world is faid to be taxed, Lev. 2. 1. that is, all that was at that time under the Roman Jurifdiction. And in this fende Delphos, becaufe it was feated on the midft of

Greece
Of the Causes of War that are unjust.

BOOK II.

Greece is said to be Totus orbis ambitus, as it were, the novel or midst of the whole earth. Neither will it be very argumentative to say with Dante, That it would be expedient for all mankind, that the Roman Emperor should have such a right of Sovereignty, seeing that Commoda quia adserit vast compropertar incommode; The conveniences that it promises to bring with it, would be attended with many more inconveniences that would follow it. For as a ship may be made of that extraordinary bulk and burthen, that it cannot be well steer'd, so an Empire may confill of fo vast a multitude of Men, and of Regions fo diverse, and fo far distant, as that no one man can possibly govern it: Yea, and if we should grant, that it were fo universally expedient, yet would it not thence necessaril follow, that this should actually confer a Right to the Roman Emperours, because such a Right cannot possibly arise, but either by confequent, or by way of punishment. Neither hath the Roman Emperour a Right to all those Countries now, which once belonged to his Predecessors: For as many of them were got by Conquest, to have they long since been left by Conquest; as some also have been quitted by Agreement, others being deferted have fallen under the jurisdiction of other Nations and Kings. And some Cities which heretofore were wholly Subjects, became afterwards but in part only, or admitted into a Social League, upon terms only unequal. For by all, or any of these ways the Roman Empire, as well as any other might either lose or change, whatsoever Right they could formerly have or pretend unto.

But some there were that would challenge to themselves the power of the whole Church also, even over those people who dwell in the parts of the world, which are as yet unknown; whereas St. Paul himself openly profcribs, That without the bounds of Christianity he had no right to judge, What have I to do (faith he) to judge those that are without? And although that power which the Apostle had, did in its manner appertain unto earthly things, yet was not that power of Earthly, but of Divine Institution, and to be exercised not by weapons or fuggers, but by the Word of God generally preached, and applied to some particular circumstances, and by exhibiting or denying the seals of the remission of sins, as it should condufe to the salvation of every man. And in the last place, by a revenge supernatural, and therefore proceeding from God himself, as in the cafes of Ananias, Elymas, Hymenaeus, and others, it evidently appeared: Yea, and our blessed Salvour himself, from whom all Ecclesiastical Power flows, and whole life was a perfect Exemplar or Copy for the Church to imitate, denied his Kingdom to be of this world; that is, of the same nature with other Kingdoms: adding this, For if it were, then after the manner of other Kings, should my servants fight. And yet it now, in cahfe he would pray to his Father to send him an Army, it should consist not of Men, but of Angels, Mat. 26. 53. And whatsoever he did by the Right of his own Power, he did it not by humane strength, but by the virtue of his Diviniry; and that even then when he drove the buyers and fellers out of the Temple; the whip he used was not the Instrument of Gods wrath, but the sign or Symbol only; so was the spittle and the oyl, as Abuluesor observes, not the false, but the sign of the cure. St. Augufline upon that place of John before-cited, thus proclaims, Hearken therefore O ye Jews and Gentiles, circumcised and uncircumcised: And hear ye Kingdom of the Earth, your Emperors here I impede not; for my Kingdom is not of this world: Be ye not moved with vain fears, as Herod the Great was at the report of Christ's birth, who was so far transported with jealousy, that he slew a multitude of innocent Babes, thinking thereby to secure his own Kingdom by the death of this new born King: Timendo patiunt quom irascendo cruelior; being more enraged through fear and jealousy than anger. My Kingdom, faith he, is not of this world: What could have been said more to diffet those fears? Come, and be partakers with me of that Kingdom, which is not of this world: Come unto me by faith, and let not your fears provoke you to cruelty. So likewise Hilary Bishop of Arles, Christ came not into the world to invade another mans Glory; but to communicate his own; not to inflam an earthly Kingdom, but to confer an heavenly. St. Paul tells Timothy, That a Bishop should be no Striker, 1 Tim. 3. 2. Nor rule by constraint or compulsion; for to drive by force, better become a King than a Bishop. Princes may exercise their Power in punishing Offenders to deter them from doing evil: But what we do, faith Chrysostome, must be, not by coercion, but by persuasion: whereunto he adds this Reason, For God crowns not our forced, but our voluntary; or as St. Paul speaks, our reasonable service. So in another place, It is our duty to inflame, persuade, exhort; and to prove, but not to command, or to compel: Conscriptiorum locum omnium; We serve at Councilors to advice, and to give our Opinions, but will we leave our Auditors to their free choice, whether they will all accordingly or no: We have no such power given us, as to restrain men from sinning by severe punishments. Whence it is evident, that bishops, as such, have no Right of Domination over men, as Kings and Princes have, St. Hierome distinguishing between a King and a Bishop, concludes, That the Power of a Bishop is much inferior to that of a King, for a King may enforce to an unwilling obedience; but a Bishop hath no power but over such as are willing to obey him. Episopus doect, ne judex inventas quod puniat; The
The Bishop infruits and admonisheth, that the Magistrate may find no cause to punish. It was well laid of Frederick the Emperor concerning the Pope:

Ecclesiæ regat ille sciam, divinæque joræ
Temperet: Imperium nobis, suæsæque relinquat.

Let him his own Church rule, by Laws Divine,
But let the Sword and Scepter still be mine.

And when Suenno King of Denmark, froid Excommunicate, William Bishop of Rofhild, in opposing himself against him, at his entrance into the Church with his pastoral staff, and exposing his breast naked to the officers of the King, who offered to draw upon him, did therein perform the office of a good Bishop. The like did St. Ambrose to the Emperor Pa
tellius, as we have declared above; but whether it be lawful for Kings themselves to make War upon such as have rejected Christianity by way of punishment, we have already else
where discoursed in the Chapter of Punishments, as far as sufficient to our purpose.

And hereof also I shall give my advice, and that not in vain, (but because I foresee, by comparing these modern times with those long since past, much mischief likely to ensue, unless in time carefully prevented) that the hopes we conceive that some things are due un
to us, by our own interpretation of some Prophecies, can be no cause of a just War. (Zosimus records it of Nicomedes the Son of Phrafa, that mis-applying a Prophecy of one of the Sibyls, by the perversion of Atalas made War against his own Father; the like he and Ammianus relates of one Theodorus; to both Propocius of John of Cappodocia.) For besides that tho' those Prophecies which are not fulfilled, cannot certainly be understood without a Prophe
tic Spirit, the very time of the accomplishment of such as are certain may be hidden from us. And lastly the bare prediction, unless it be backed with an express command from God, gives no right to any man, seeing that God permits such things as he predicts to be sometime brought to pass, by wicked men and by wicked actions: For the Books of the Pro
phecies are shut and sealed up until a certain time, io that they cannot be understood, Dan. 12. 4. 8. 9. The Vision that the Prophet Habakkuk law concerning the judgments to fall on the Chaldeans, was not immediately to be inflicted on them, But it was to be fulfilled in its appointed time. In the end whereof, faith vision, it shall speak and not by though it do tarry: yet was the Prophet to wait for it, for it shall surely come to pass and not slay, Hab. 2. 3. Time then is the best interpreter of Prophecies. St. Jerome upon that place of Daniel before
cited writes thus, If the Prophet did hear and not understand, what will they do who prejuming on their own understanding, have published this Book which is sealed up, and until the time come for its accomplishment. So Propocius concerning the Oracles of the Sibyls, Which, faith he, I be
ter are beyond all human power to unfold, until the time come when they shall be fulfilled. Let Divines therefore take heed how they undertake to unriddle Prophecies; and let Politicians beware how they give credit to over-arrogating Divines, though the things predicted were certainly to come to pass; yet are the times and means when and whereby they are to be accomplished very uncertain: and therefore it is no dishonour to profess our ignorance of them, Coram que fieri nec datur, nec fac esse, docta est ignominia, Scotiens apparuit insanire spectaculis; Some kind of madness it is to desire to know those things, which are therefore screened from us that we should not know them. The secret things belong unto God; but the things revealed, unto us, Deut. 29. 29.

Thus also it is to be observed, that in case any thing be owing to a man, not strictly out
of justice, but arising from some other virtue, as from liberality, favour, mercy, love, or the like, as it cannot be recovered by any course of Law, so neither can it be required by War. For to either of these it is sufficient not, that what is required is for some moral rea
son to be done: But besides that, it is necessary that there should be in us some kind of Right unto that, such a kind of Right as the Laws both Divine and Humane do sometimes give even unto such things as are due by other virtues; which when it happens, then it be
comes a debt after a new way, which now appertains to justice. But this being wanting, the War that is made for this cause is unjust; as was that made by the Romans against the King of Cyprus for ingratitude. For he that doth a courtesie to another, hath no Right to exact thanks; other wise it were not a courtesie, but a contract or debt.

It is also to be observed, that though there be a just cause of War, yet may this just
cause be spoiled by the access of some vice that cleaves to the action from the mind of the Agent, either that something else, not by it self unlawful, doth more efficaciously move us to the War, than the Right it self, as when we have a greater prospect unto Glory, or when some kind of profit either publick or private, is expected to arise from the very War, being considered a part from the cause that justifies it, which vice is more dangerous, be
cause it comes mantled with the Robe of Vertue: But as St. Augustine rightly advieth,
Satis est exjuslibet inertia pennis hiero; quam si formi armorum gloriam quacere; Better it is to

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Not a debt not
thrillfully, but some other
way.

Though the
War be just,
yet the manner of
prosecuting
it, may make
it unjust.
suffer the punishments of any cowardice, then to seek glory by such a War. This was it that fullied all the Victories of Alexander, and for which all Historians declaimed against him as a Robber, because he made War only for Ambition; and to that end disquieted the whole World, vexing all Nations without any cause given, and making War upon those whom he never knew: for what could this be but as St. Augustine calls it, *Grande Latrocinium? A great Robbery.* Or a just cause may be spoiled when accompanied with a passion manifestly unlawful; as when we rejoice in the destruction of our Enemies barely as such, without respect to any thing that is good. So Aristides was of opinion that the Poecofes were deservedly destroyed; but withall he condemned King Philip for destroying them, because he did it, not upon the score of Religion as he pretended: but out of an Ambitious desire to enlarge his Empire. Salust attributes all Wars to this one, and that very ancient cause, namely, a vehement thirst after Dominion and Riches. And it was Tacitus his observation, That Gold and Wealth were the principal causes of making War; which Seneca attributes to Covetousnes and Revenge,

Mad anger and a greedy thirst for gain
The League have broke.

Whereunto we may add that of St. Augustine, *An earnest desire to make what spoil we can, the cruelty of Revenge, an unquenchable Spirit, Contumacy and Rebellion, together with an ambitious thirst after Empire and Riches, these and the like are deservedly blamed in all Wars. But yet there where a justifying cause is not wanting, though they favour rankly of a corrupt mind, yet do they not render the War properly unjust; and therefore restitution cannot justly be required of damages sustained in such a War.*

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**CHAP. XXIII.**

Of the Causes of War that are doubtful.

I. Whence doubts arise in moral matters.
II. That we ought to do nothing contrary to the dictates of our own judgment, though erroneous.
III. That the judgment is sometimes swayed by arguments drawn from the thing itself.
IV. Sometimes by the Authority of others.
V. If on either side doubts do equally arise, and the matter be weighty, and one must be chosen, then we are to choose the safer.
VI. Whence it follows, that in such a case we are not to engage in War.
VII. Which may be avoided, either by a Treaty.
VIII. Or by Arbitration, where also is handled the duty of Christian Princes, in mediating between the parties engaged in War.
IX. Or by lot.
X. Whether single Combats may be admitted to prevent a publick War.
XI. That the present occupant hath some advantage, where the cause is equally doubtful.
XII. Where the cause is equally doubtful on both sides, and neither party be in possession, the matter contended for may be decided.
XIII. Whether a War may be on both sides just, explained by many distinctions.

I.

It is true, what Aristotle in the first of his Morals teacheth, That there cannot be the same certainty in Ethics, as in Mathematics; which therefore happens, because the Mathematics abstract forms from all matter; and because the very forms themselves are such for the most part, as will admit of no mean: As between straight and crooked there is nothing intervenient. But in Morals the least circumstance varies the matter, and the forms concerning which we treat, have usually something interjacent, and of that latitude, that they sometimes approach nearer to this extreme, and sometimes nearer to that. As between things absolutely commanded, and things absolutely interdicted, there are some things that may, or may not be done: so between things exactly just, and things absolutely unjust, there are some things intermediate; whereof some coincide nearer to this extreme, and some to that: From whence doth often arise some doubt and ambiguity, to whether of the two extremes they approach nearest; as we may perceive in the degrees of heat and cold in water when it is tepid, and in the degrees of light and darknes, health and sickness, &c. Infomuch that (as Aristotle teacheth) The judgment hath sometimes an hard task to determine, which is to be preferred before the other. But Andronicus Rhodos goes yet farther, affirming, That it is a very difficult thing sometimes to distinguish between (Realities and Refemblances) things exactly just, and things that are only apparently so.

But
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Of the Causes of War that are doubtfull.

But this Rule is in the first place to be constanty observed, That though an Act be really just, yet if upon a serious examination we shall judge it to be unjust, to us if we do it, it is so: And this is that which St. Paul intends when he faith, Whatsoever is not of faith is sin. In which place, Faith signifies the firm perswation or judgment of the mind concerning a thing: as may easily be collected from tho' other expressions of St. Paul in the fame Chapter. Let every man be fully perswaded in his own mind. Blinded is the man that condemneth not himself in that which he alloweth; Peccatum est & ad altier sit quam probatum est; Whatsoever any man doth, faith St. Ambrose, otherwise than what his own confession approveth is sin. For that a thing be well done, faith Plutarch, it is requisite, not ony that what is done be just and honest, but that there be a firm and constant perswasion of mind in him that doth it, that what is done, is therefore done, because his confidence tells him that it ought to be so done. For God hath endued the rational foule with a differing faculty, to the end, that it may guide us in all our actions, which being flighted, the mind immediately becomes fenfual and brutish. But yet it sometimes falls out, that the judgment waveth and gives but a dim and uncertain light; which if upon a mature disquisition we cannot clear, then we should take the advice of Cicero, and forbear to act whilst we remain doubtfull whether it be just or unjust. The like advice Plut. gives, Whereon then doubteth forbear. The Hebrew Doctors also give this caution, Beware and forbear in matters that are dubious. But this is then only feasurable where we have a free choice, either to do or not to do; but not where we are obliged to do either this or that, and yet are unsatisfied in either, whether it be just or not: for there we are to chuse that which in our judgment seems to be lefs evil. Semper enim ubi electio evadendi non possit, minus malum rationem induit boni; For always when the will is strained between two evils, and the choice of one of them cannot be avoided, there the lefser evil hath it an appearance of good; because it/partakes more of goodnesse than the other doth; and therefore, of evils the lefser ought to be choosen, faith Aristotle : So alio Cicero, De malis minimum, Of evils chuse the lefser. And Quintilian, in comparing evils, the lefser usurps the place of good.

But it often falls out in doubtfull Causes, That notwithstanding our strictest disquisition, yet the mind hangs as it were in a tottering condition, sometimes inclining unto this, sometimes unto that part, being poiuzed sometimes by arguments drawn from the matter it self, and sometimes by the Authority of Grave and Learned Men, who have declared their Opinions on that very cafe. As for as St. Augustine in his third Book of Order well observes, When our minds are assaullt with any difficulty, we have two ways to extricate our selves, either by our own reason, or by the Authority of the most learned. And herein also doth that of Hesiod hold true, which Minucius in Lecy makes use of after a battle unsuccessfully fought, The highest point of wisdom is to be able to manage our affairs by the strength of our own judgments: The next is to hearken to the advice of the best men; but he that is neither wise enough to govern by himself, nor willing to be led by the Consuel of wise men, is a rank fool. Whereunto Cicero likewise alludes in his Oration for Cluentius, He is accounted the wisest of men, that in all occurrences is able to direct himself; next unto him is he that can be content to hearken to the good counsel of others: but he that cannot do the former, and will not do the latter, is in the lowest form. Now the Arguments from the thing it self are drawn from the causes, from the effects, or from some other adjuncts:

But to know these things rightly, there is required much knowledge and experience; and if either of these be wanting, whereby the judgment may be rightly informed to act by itself, then are we bound to steer our affairs by the advice and counsel of the most judicious. For that, faith Aristotle, is most probable which is approved of by all, or by the molt, or certainly by wise men; and of these, by either all, or by the greatlest part, or by the molt prudent and judicious of them: And by these means do Kings, who have no leasure to be eminently learned, grow notwithstanding withy the counsel of others:

Thus Princes by their Senators grow wise.

Thus Ariftides in his Oration for Peace tells the Rhodians, As in matters of fact, that which is attested by the most authentic and judicious witnesses is held for truth: So in matters of policy, those counsels are safest, which are approved of by men of the greatest learning and experience. The ancient Romans never made War without consulting the Colledge of Herauld,
Of the Causes of War that are doubtfull.  

BOOK II.

And it is recorded of Alexander the Great, that he admitted into his Council men of the greatest Learning, but most especially Historians.

But in many Controversies it falls out, That the Arguments on both sides, as well from our own Reason, as from Authority, are so equally probable, that it is very difficult to judge where the Right is: And in such a case, if the matter in question be of no great moment, the judgment may be blameless, though it pass on either side. But if it be of great concernment, as in passing sentence of life and death upon a putrefied offender, then by reason of the vast distance that there is between the parts eligible, that part is to be adjudged best, that is safest. And therefore it is much better to absolve the Guilty, than to condemn the Innocent, faith Aristotle; and he adds this reason, For where the case is dubious, we should chose that part which will infer the least danger in case we should err. To the same purpose is that of Antiphon, If we must needs run the hazard of misjudging, it is more pious unwrighteously to pardon, than injuriouly to condemn, for by the former we can be charged but with errors; but by the latter, with wickedness.

To make War is a matter of the greatest consequence that can concern a Nation, whence ensues a torrent of mischiefs (as by a Sea-breach) whereby many thousands of innocent people are on both sides destroyed: And therefore amongst all our consultations the safest counsels are those that incline unto Peace. This was it for which the Italian Poet fo highly extolled Q. Fabius:

Dangers he prudently foresaw, nor for
Things mean or Doubtfull, gladly would make War.

Now three ways there are whereby differences among Princes may be reconciled without breaking out into open War.

The first whereof is by Treaty or Conference: Seeing there are two ways of debating differences, faith Cicero, The one by argument, the other by plain force; whereof that is proper to men, this to beasts: we may make the latter our refuge, if we cannot receive satisfaction by the former. This is the method which Dionysius Halicarnassensis prescribes; not over-hastily to fly to blows, till we have tried how words will prevail:

All means unarm'd, wise men will first assay,
How know it, if ask't, but he'll unscord obey?

So Dionysius Halicarnassensis, We must not proceed to blows, until we have tried what words can do: Agreeable whereunto is that of Menelaus in Libanius, It more becomes a man to make trial how he can prevail with Reason and Arguments, before he rashly rush into War. So allo Menelaus in Libanius, It is more agreeable to humane Nature, to try, how far we can prevail with Reason, than suddenly to fly into arms: The like we find in Euripides;

Thus I've obtain by words, if not, by blows.

Thus Panes in Livy, There are, faith he, many things, which men rather than make War, are willing to remit; which notwithstanding cannot be enforced from them by force of arms. Mardonius in Herodotus blames the Grecians upon this account, That being all one Language, they did not at first argue their grievances by the mediation of Herauld and Ambassadors before they broke out into Arms. So Coriolanus in Dionysius Halicarnassensis, If a man, (faith he) without owning another, do but demand his own, and being thereof denied, shall make War; that War, by the consent of all Nations is most just. For as King Tullus faith in the same Author, Qua verbis compone sequentum, ea animis deterenda sunt; Those differences which cannot by reasons be compos'd, must be determined by blows: And yet, as Polygeles in Tacitus declares, I had rather keep what mine Ancestors have left me by Equity, than by the expense of blood, by mine own soft Tistle, than by a doubfull War. For as King Theodorick, wilily oberved, They only is War profitable, when our Enemies will not otherwise do us Justice.

The second way to prevent War between those who have no Common Judge between them, is to put the matter in question to Arbitration: This, though much favored by fuch Princes as are too confident in their own strength, yet is worthy to be preft and infilled on by all that love Peace and Equity: To persecute him as an enemy that is willing to put his Case to an indifferent Arbitr, is impious and unjust, faith Thucydides. So concerning the Kingdom of the Aegrotes, Adriffus and Amphirao were both content to refer themselves to the judgment of Eribylos, as Diiodorus testifies. The like did the Athenians and the Megarenses to three Lucadenmonis concerning the Illand Salamin. The Name Thucydides records
cords this to be one of the Articles agreed on, in the League between the Lacedemonians and the Argives; That in case any Controversy should at any time arise between their Cities, the matter in difference should amicably be referred to a third City, which should be indifferent to both, according to the ancient custom of their fore-fathers. Thus the Carthaginians declare their readines to refer their difference with the Carthaginians, to any of the Peloponnesian Cities that they should agree upon. Many Great Princes and States, to have the effusion of blood, have been contented to put their grievances to Arbitration. Arbites commands Pericles, that to avoid a doubtful War, he was willing to commit his Cause to indifferent Judges. So also both Iocrates in his Oration against Cestipontis, highly extol King Philip of Macedon for his readines to refer all those Controversies which he had with the Athenians, to some other City that would indifferently affect to either party. Thus do the Sammites, as to the differences between themselves and the Romans, offer to stand by the award of those States or that were at Peace with both of them, Cyrus makes the Indian King Judge between himself and the Assyrians: So do the Carthaginians to avoid a War put the Cause of their Quarrel with the Romans, to the Judgment of others. Yea, and the Romans themselves do refer their differences with the Sammites, to be compromised by their common Associates. We, for our parts are ready (say the Greeks to the Lombards in Procopius) to refer our selves to any indifferent Arbiters. Queen Elizabeth offered to refer the differences between herself and the Duke, unto Commissioners on both sides, or unto the Elector of Brandenburg, the King of Denmark’s Father in Law, and to the Duke of Mecklenburgh, and the Duke of Brunswick as Arbitrators. Now they that refuse this way of dispensation, by Reasons, Arguments or Arbitrements, running rashly into War, when it may be avoided, declare all Justice, Humanity, and the common practice of the best and wisest Princes. Yet, that Philip King of Spain would not admit of the Pope to be Judge between him and other Competitors, for the Kingdom of Portugal, I do not wonder; because the Pope claimed the decision of all such Controversies as his proper Right; wherefore that wise King was unwilling to give his own Example to some ancient ones, whereby the Pope might hereafter prove himself to be the sole Arbitr and Dispofeter of Kingdoms. Many other Examples may be produced, but in a Cafe so clear these may suffice. Plutarch tells us, That it was the principal duty of the College of Herodots among the Romans to take care, Ne ferner prius ad bellum veniri, quam ipse omnis judicii obiuncti perilllet; That no War should be attempted, but where all hopes of receiving satisfaction for injuries done them by any other means were frufrated. And Strabo tells us of the Dreideus in Gallia; That abjuntly they were the Arbitrers between publick enemies, and that, by their mediation Peace was often made, even when the Armies were preparing for battle: Which Office did of old in Spain appertain to their Priests, as the fame Author records. But much more doth it concern Christian Kings and States to prevent the effusion of blood by this means. For if both Jews and Christians have thought fit to appoint Arbitrators among themselves to determine all Controversies, to the intent, That Brother should not go to Law with Brother before unbelievers, as St Paul hath also commanded; how much more reason is there that such Arbitrators or Judges should be chosen by us to prevent mischiefs far greater than going to Law, namely, Spoil, rapine, murther, yea, and sometimes defolation, which are the unhappy concomitants of cruel War? From whence Terrillus concludes, That a Christian ought not to wage War, seeing that it is not lawful for him to go to War; which notwithstanding is to be understood in a qualified sense. And indeed it is very unwise for Princes who profess themselves to be followers of Christ, to rush into arms one against the other with so much bitterness, seeing that there are other means found out to compromise their Quarrels, and to make better use of their Arms and Valour against the Common Enemy. And for this, as well as for many other reasons, it would be very convenient, nay necessary, that confant Diets and Conventions of Christian Princes should be held, where by the prudence and moderation of such as are not interfred, all Controversies may be composed; yea, and that some expedient may be found out to enforce both Parties to accept of Peace upon equal and indifferent terms; whereof we may find Examples in Caflidore, Gallinii, and others, which anciently was committed to the care of the Dreideus in France, to whom the Bishops did afterwards by a better Right succed, So we read of the French Kings, that in the division of the Kingdom, they have referred themselves to the judgment of their Peers.

The third way to prevent War is to decide Controversies by Lots, which Dion Chrysostome much commendeth; and long before him Solomon, Prov. 18. 18. whereof see St Augustine’s first Book, 28 Chap. of Christian Doctrines. Near of kin unto this are single combats between Competitors, the use whereof is not altogether to be rejected: for where two perfons, flanding in competition for one thing which cannot be divided, are ready to embroil a whole Nation in blood; It were much better, and more just, than one should persue for all, than that all should persue for one only. In which Case that of Iocasius in Seneca is good advice,
And this if not justifiable in the competitors themselves, yet may it well be accepted of the people if offered, as being of two evils by much the lesser. Thus Metius in Livy befoke Tullus. Let us agree about some way whereby it may be determined, whether of us two shall reign over the other, without the effusion of so much blood, or the slaughter of either of our people. Strabo set it down as an ancient custom among the Grecians; And Aeneas in Virgil accounted it a very just thing, that the quarrel between Turnus and him should have been thus decided:

Fitter 't had been for Turnus thus 't have died.

And for this cause it was, that M. Anthony challenged Cesar to a single combate, as Pintarch records. Sure it is, that amongst other customs of the Ancient Francks, Agathias highly commendeth this, whose words being worthy of Eternal Memory, are to this purpose: No sooner did any quarrel arise between their Kings, but immediately they betake themselves to their Arms, they raise Armies and march against each other so furiously, as if nothing but an absolute conquest could end the controversy; but yet as soon as the Armies met and faced, they presently laid aside all animosity and made peace; thereby enforcing (as it were) their Kings to dispute their grievances, rather by Law than Arms, or if that pleased them not, then to end their quarrels with the peril of their own lives only, as judging it neither just nor reasonable, nor indeed agreeable to their national customs, for their Kings to sacrifice the Commonwealth to their private hatred; whereas they instantly disbanded their Armies, reconcile their Princes, and make Peace: Tanta in subditis cura justitie & patris amor, in regibus animus placidus & fuis obsequens; So great in the subject was their esteem of justice and love to their Country; and in their Kings, their moderation of spirit, and their compliance with the people, in order to their common safety.

Although where the equity of the cause is doubtful, both Parties are obliged to seek after conditions of peace, to prevent the miferies of War; yet doth it more concern him that demands, than him that enjoys what the other requires, as in the like equal cause, Melior eff pollicitas conditio; The title of the present occupant is presumed to be best, as being most agreeable not only to civil, but to natural Right; the reason whereof we have already given elfwhere out of Aristotele's Problems: whereunto we must here add, That War cannot be lawfully made by him, who though he knows his title to what he claims to be good, yet cannot produce evidence sufficient to convince the present occupant of the illegality of his possession, because he hath not a Right to compel his Adversary to leave his possession.

Where the Right is equally ambiguous, and neither party in possession, or both equally, then he is to be reputed unjust, that shall refuse an equal partition of the thing controverted, being offered unto him.

By what hath been herein said, it will be no hard matter to resolve that question which is so frequently controverted, Whether a War in respect of the principal promoters of it, can be on both sides just; where we must first distinguish between the various acception of the word just. * For a thing may be said to be just, in respect of the cause, or according to the effects. Again, a thing may be just in respect of the cause, either according to the spacial and strict acception of justice, or according to its more general acception, as it comprehends whatsoever in equity or honesty ought to be done. Again the word just, taken in its spacial significance may be subdivided into, into that which respects the work done, or into that which respects the mind of him that doth it; for the agent may sometimes be said to do justly, whilst he doth not unjustly, though that which he doth be not just. As Aristotele rightly distinguishes between τὰ δικαία ἐν τῷ ἔργῳ and τὰ δικαία ἐν τῷ νο῏ν, to do unjustly, and to do that which is unjust. Bonis male utuntur, qui temporali facto jutile judicant; They make ill use of things in themselves good, who do justice for rewards fake; because it is the hopes of gain, and the love of justice that excites them to defend the truth. Now in this spacial acception of the word just, and as it relates to the thing it self, no War can be on both sides just; as, neither can any other conteft be: Quis facultas moralis ad contraria non datur per ei ipsius naturam; Because the very nature of the thing, about which the dispute was, will not admit of a moral power to things that are contrary: as namely, to do a thing, and yet to oppose the doing of it. But yet it may very well be, That neither of the Parties warring against each other doth unjustly; because no man can be said to do unjustly, but he that knows that which he doth to be unjust. But many men do not know that they do amis, though
though that which they do, be in it self unjust; so when men go to Law, they may justly (that is) with a good mind, and intention do it on both sides, because they do both conceive that they are in the right; for of many things, as well in point of Right, as in matters of fact whence Right ariseth, men are ignorant. Now in the general acceptance of the word just, that is said to be just in the doing, whereof the Agent is altogether innocent; for the act may be unjust, and yet the Agent blameths, by reason of his inufferable ignorance. An example whereof we have in such as being (through no default of theirs) ignorant of the Law, do not observe it; although hapily that Law be promulgated, and time of it self sufficient allowed for the knowledge thereof : As also in such as go to Law, both Parties may be free, not from injustice only, but from any thing else that is blamable; especially when both, or either of them contend, not in the behalf of themselves but of others; as a Tutor for his Pupil, a Guardian for his Ward, whole Right he is bound in duty to defend, though that Right be but uncertain. So in a wager at Law, two perfons may contend for one and the same thing, and yet neither of them be unjust: So also a Councillor, may plead for either of them, without the least derogation to his honesty. Nay as Aristotle well notes, to say of a Judge, that he judgeth right, is but an Ambiguous speech; for it may signify either that he judgeth it: So, plainly as he ought without any ignorance, or κακή τοι ἐπιστήμη, according to the best of his knowledge, or the clearest evidence that is brought before him. And therefore the sentence which must pass, according to that evidence may be (through mis-information) unjust, and yet the Judge that poureth that sentence may be righteous. * If it be doubtfull on what side the Right stands, if both Parties contend for it, it is probable that neither doth unjustly. The Jews made War against the Canaanites justly, being so commanded by God; and the Canaanites being ignorant of that charge given against them, did justly in defending themselves: wherefore that War was on both sides just. Thus Pope Pius the second anwervered the Hungarian Embassador that complained against the Emperour, namely, He thought that the King of Hungary did intend nothing dishonestly, and he knew that the Emperour was a great lover of justice: But both contending for the Kingdom, probable it was, that neither of them thought his Caufe unjust. In all controversies this is found true, but especially in War, that both Parties pretend to maintain a Caufe that is just: But in War it is hardly possible, that either party should be in that lenfe just, that is, free from all blame, by reason of that great defect of love, and that overmuch rancours, that for the most part ineparably accompanies it; besides the weightiness of the business itself which is such, as being not satisfied with probabilities, strictly requires such proofs, as are demonstrative and convincing. But if we account that to be just, which is permitted to enjoy some effects of Right; it is most certain, that War in this lenfe may be on both sides just, as will appear anon, when we come to treat of a publick solemn War: for so, both a sentence though not rightly pass, and a posseffion not rightly gained, have both of them some effects of that which is right.

To some things the Right is not disagreeable whole it is; and then, whilst each endeavours to take that from another, which he thinks belongs to himself, who can condemn either of injustice?

Nemo debeat jus from indigent, sum vileginique, Tenenda sunt quaeque tantiorem jus, Beatus.

Again when something dut is very profitable, stands in opposition to what is honest, it is no easy matter to tell whether of them to follow. When we first entered into War with Niger, faith Severus the Emperour, there was I confess no very plausible pretence for War, but the Empire lay at stake between us, and both of us strove which should appropriate it to himself, Herodian.

* Si dubium est a qua partis sit justitiae, hanc si altera parte quaeritis, injusta sit, non rei puffa.

In disputationibus fortis, par est litigans sibi, legitimamque jus datum, ut pro altero revera sententia.

According to the effects of Right, War may be on both sides just.

CHAP.
CHAP. XXIV.

War, though Juft, not to be undertaken rashly.

I. It is better sometimes to remit our own Right, than to engage in a doubtful War.
II. But especially, when undertaken to exact punishment.
III. And chiefly by a King that is injured.
IV. And that sometimes for his own and his Subjects safety.
V. Certain Rules guiding us to a prudent choice of things apparently good.
VI. An example whereby we may be guided in our endeavours after liberty or peace; where by the miseries of War may be prevented.

T

ough it be not properly pertinent to our purpose in treating only of the Rights of War, to shew how far other Virtues do either enjoy or persuade thereunto, yet will it not be altogether impertinent for preventing of mistakes, to give some cautions about it, lest any man should think, that whencesoever he hath a Just Cause offered him, he is bound to make War, or at least, that it is at all times lawful for him to do: whereas on the contrary, it is, (for the most part) much more pious to remit somewhat of our Right, than to endanger to defend it by a dangerous War. We Christians are especially taught to expost our own lives to the greatest perils that can be, to prefer the lives, and (as much as in us lies) to procure the everlasting welfare of others, in imitation of our great Lord and Master, who laid down his own life to save ours, even then when we were strangers, nay, enemies unto him, Rom. g. 6. How much more reason have we to forbear the profecution of our Just Rights, when they cannot be obtained without the effusion of so much Christian blood, and the destruction of so many mens Lives and Estates, besides other mischief, which War usually brings with it? This we are forewarn'd of by Aristotle, and also by Polybius, not for every such cause to run the hazard of a War. For the necessary defence of our Liberties, our Wives and Children, we may lawfully make War, faith Galio in Seneca; but not for such things as are either superfluous, or being loth, do not much dammifie us: This and somewhat more did Apollonius say to the King of Babylon, We are not to contend with the Romans for a few small Villages, which many of our Ancestors being but private men did enjoy. They must be great matters indeed, that should so far provoke us, as to undertake a War, (especially with such potent enemies.) The like foolish jests of his Countrymen, It is not our custom to muster up our Forces, or to make War to engrade our Dominions, but for the defence of our Laws: All other losses we can bear with patience, but being debar'd the use of our Religion, we undertake War beyond our strength, and prosecute them to the utmost of dangers. It was prudently adviz'd by Dion Philippus in his Oration concerning War and Peace. We are not so much to consider whether we have been justly provoked or no, as whether the injuries we have suffered be such as will counterbalance the expense of so much blood and treasure as will be expended in the prosecution of a War for satisfaction.

There are many arguments whereby we may be dissuaded from exacting punishments: For first we see how many failings Parents are willing to wink at in their Children; A Father (faith Seneca *) unless highly provoked by many and those bainerous offences, so that his fears swell higher than his just anger, will not proceed against his Son with the utmost vigour and severity. Augustus sitting in Council with a Father concerning a punishment to be inflicted on his Son, being found guilty of an intended Parricide, would not adjudge him to the Sack, the Serpent, or to Prison, but to banishment only whether his Father pleased, reflecting not so much the person offending, as the person offended; as knowing that gentle punishments would best appease the wrath of a Father towards his own son.

Pro peccato magno paululum suppliciis satis est patri; Few stripes, for great faults, Parents will appease.

Fathers (faith Philo) do sometimes pass that sentence of exhoradation on their own sons, thereby cutting them off from their own families and kindred, but never till they grow shameless and incorrigibly wicked, and that their hatred of their Childrens Vices have quite overcome that great and unparallel'd Love, which Nature had at first imprinted in them. Not much different is that
Chap. xxiv. War, though just, not to be undertaken rashly.

of the Rhinhas in Diodorus, No Father doth willingly punish his Sons, unless the meafure of their wickedness do very much exceed the meafure of his natural affection. Not that of Andre-} 


ichus Rhadus, No Father can be unnatural as to caft off his Son, if he he not extremely wicked. Now whoever undertakes to punish another, allimes unto himfelf, in a manner, the per-} 


on and office of a Governour, that is, of a Father; whereunto St. Augustine alludes, when he thus bepake Murellous, Perform (O thou Christian Judge) the office of a piou Father, who always prefers pardon before punishment. A merciful man (faith Seneca) is as Ep. 87; unwilling to spill another man's blood, as he is to spill his own; knowing that nature in every man is equally folicitous to preserve if its being: And therefore, It befits men, who are linked together by the bands of Confanguinity, to be as foaring of other men's lives as of their own; for not every man that offends is to be punished, but only that perfift in their sins without repentance. Let all men that are strangers to our faith, faith Cicero, know, that the reverence which we bear unto Chrift is fo great, that it restrained all earthly powers: Servants are taught to honour their Masters, and Masters to forgive their fellow Servants; that so our Great Lord and Master may be propitious unto us in that Great Day of Judgment. It is ufual in Scripture, where mention is made of fins and punishments, to allay one word with another; and to a word that is likely to heighten our anger, to add another that may serve to qualify it. If a man shall commit a treafy afainft his neighbour (faith Mofes) which two words (faith St. Augustine) a man and a finner, are not conjoined without a Mystery, but for this end, that if the finner do excaft our, the word man should presently become us: for as he is a finner he deserves punishment; but as he is a man, he be faves to be poffed. So in the new Law, thou killeft a man in thy Brother's eye, Matt. 7. 13. A mate that offends us no lefs than it doth our Brother, and our zeal is quickly inflamed to pull it out; but when we confider, that it is in the eye, and which is more, in our Brother's eye, then we go wary about it, left withall we endeavour to pull out the more, we put out our Brothers eye. So in another place, If thy Brother offend thee, Luk. 17. 3. the offence provokes us presently to passion; but when we confider that he who gives it is Fratcr, our Brother, that is, quafi fex alter, One caft in the fame mold with us, and scarcely divided from our felves; this fhould instantly appeafe our swelling passion; fo that though angry we may be, yet revenge we must not. The Emperor Julian applauded that faying of Pitracus, which preferred pardon before punishments. But whoever will imitate his heavenly Father (faith Lubinius) must ore pro An glory more in forgiving than in punishing; for in nothing do we draw nearer to the Divine Nature (fait Cecro) than in giving life to them, who have deferted Enemies. Again fuch cafs there may happen, wherein to abfain from claiming our Right, is not fo much a courtefie as a debt, in regard of that love which we owe unto all men though Enemies, whether confidered in it felf, or in obedience to the Law of Chrift: yea, and fon perfon there are, whofefafety, though they fhould perfecute us, we are bound to prefer, even before our own lives; becaufe we know that their welfare is either very neceffary, or very pro-} 


fitable to the Commonwealth. And if Chrift did enjoin us to part with our Coat, rather than to contend for our Cloak, certainly he would have neglected much greater lofles, rather than go to War; because there is no content to deftructive as War. Sometime again, the remedy brings more danger than the difeafe; And (as St. Ambrofe obferves) to forgo something of our just rights, is not only liberal, but for the moft part gainful. Arifides exhorts} 


the Grecian Cities to peace, perfwades them rather to yield, than to quarrel for small matters, In imitation of good men, who had rather fit down with lofs, than go to Law for trifles. And Xenophon will inform us, That it is the part of a wise man, not to embrafh himfelf in War, though for matters of great importance. The like advice Apollonius gives unto Princes, Not. Grat. Hift. l. 6. to engage in War though for great matters.

As concerning punishments, our principal duty, if not as men, yet as Chriftians, is willingly and readily to remit them, as God in Chrift doth unto us, Eph. 4. 32. Seneca} 


concerning a good Prince, faith, That he is more ready to forgive infirmes done againft himfelf, than thofo done againft others; for as a magnificent person, feems to be bountiful of another man's parfe, but had rather defirous from himfelf what he gives unto others: So he only deferves the title of being mercifull, who bears his own infirmes patiently, and freely remits where he hath power to re-} 


venge. Nec quicquam glorious Principes impune ledo; Neither is there any thing more glorious than an injured Prince, that difdains to revenge his own wrongs: And therefore Kings (as Quintilian advises) fhould be exhorted to make themfelves rather famous, for their humanity and eftiny, than formidable for their severity. Among other the virtues that Ennobled C. Cesar, this is recorded by Cecro as the chief, That he never forgot any things but infirmes. Thus doth} 


Dio a plead with Agrippus, As it is the duty of Emperours, feverely to punish offendcrs againft the Commonwealth, fo is it their honour to forgive their own personal infirmes. It is very true what Antoninus the Philosopher told the Senate, That there was nothing fo unconving a Prince as to avenge his own wrongs; for though the punishment be put juft, yet being judge in his own cafe, it will feem crudely; And what Themistius faid unto the Senate in the praffe of Theodorus, That a good Prince fhould exceed thofo who had wronged him; not in power to hurt them, but in his readiness to do them good. Arifides denies that Prince to be magnificent, that is mindful.
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BOOK II.

of an injury, which Cæsar explains thus, For, faith he, there is nothing more becoming a noble person than gentleness and clemency. When one told Antisthenes that Plato spake ill of him; he answered without passion, Regium eff benefacere, & male audire; To do well and be ill, is commonly the fate of Kings. The Holy Scriptures do furnish us with many excellent examples of clemency, as in Mose; who when the people began to mutiny against him for want of flein, instead of punishing them prays for them, Numb. 11. 12. And when God himself branded Miriam with Lepræc for her feditious murmuring against him; He, instead of taking revenge, intercedes for her, healing her foul face with his devout tongue, Numb. 12. 13. The like we find in David, who being bitterly reviled by Shimei, crying out against him, Come up thou man of blood, &c. returned not reproaches for reproaches, but being urged by one to a revenge, answered meekly, Let him alone, let himcurse, for happily, God bath hidden him, 2 Sam. 16. 7-10. Thus did St Stephen intercede for his persecutors, saying, Lord, lay not this sin to their charge, Acts 7. 60. Now this doth in a more especial manner become those who are Soveraign Princes, Under whom as all things are permitted, so freely to refrain themselves, and to make the Divine Law their guide in all their actions, is the readiest way to purchase glory and immortality. The advice therefore of St Augustine to Count Bonface was worthy to be by all Kings observed, Remember speedily to forgive him, who having injured thee, begs for pardon. And these are the principal motives which should dissuade us from entring into a bloody War, though happily justly provoked, which are drawn from that affection, which as men, we either owe, or may rightly have, even unto our enemies.

Sometimes it concerns us to abstain from War, for our own and their sakes that are under us. Procopius † brings in the Gobhi thus bespeaking Belisarius, Since these things stand thus, it is a duty incumbent upon the Governors of either Nation, not to be too prodigal of the blood of their Subjects out of an ambitious desire of their own glory; but to prefer those things that are both just and profitable, not for themselves only, but for their enemies. Plutarch in the Life of Numa tells us, That after the Conclave of Heroulds had judged that they might lawfully make War, the Senate consulted, whether it were fit and expedient for them to do. In the Parable of our Saviour, it is said, That before any King entered into War, he first sat down and consulted about the charge, and whether with ten thousand he was able to encounter him that came against him with twenty thousand; and if not, he instantly sent and made peace with him. So Dionysius in Thucydidies, Although I should pronounce them guilty of great Crimes, yet I shall not adjudge them to be free, unless I see it expedient. So likewise Livy records of the Tuscans, That by sufering all things, and denying nothing, they purchased their peace with the Romans. The very fame was done by the King of Armenia in the times of the Emperor Severns, as Herodotus tells us, That the Romans fought an occasion of War with the Aeduanes in vain, for being commanded to send money and arms to their Camp, they sent both, and not only those, but villiils also, and that frankly. So Queen Amalasuntha professed to the Amabassador of the Emperor Justinian, That she would not contend with him in Arms. Sometimes an Enemy may be pacified in a moderate way; as Sisrak informs us was done by Syrmon King of the Triballs, who at once forbade Alexander the Macedonian entrance into the Island Peene, and at the same time honoured him with many rich presents: thereby shewing that it was the fear of his power, and not any hatred or contempt of his person that made him to do it. And indeed what Euripides sometimes said of the Cities of Greece, may fairly be applied to other States:

De Marte quoties in aequo, et in populum, 
Nemo immittit se temere mortem sibi, 
Sed quisque cladem definianus alteri: 
Quod si in amicis funera antec oculos forent, 
Pompeia bellorum non perisset Gracia.

When in full Senate Votes for War pass free, 
No man his own destruction doth foresee, 
But all fore-tell the others define: 
When if its own sad fate, each had foreseen, 
Greece thus by War confirm’d had never been.

When we wax proud, and confident in our own strength, (faith Livy) Let us then call to mind that great command that fortune hath over all sublunary things; together with the sudden changes, and uncertain events of War. And as Thucydides adviseth, Before we engage our selves too far, let us consider how many sad mishances do usually happen in War, which the most piercing eye of humane wisdom cannot foresee.

The things that usually fall under consultation, are either about the intermediate ends which may probably conduct to the last end we fully resolve on, or about those means whereby
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whereby we may probably obtain those ends: The end we propose to our selves is always either some good, or doubtles the avoiding of some evil, which also falls under the notion of good. But those things that lead us hither or thither, are not expetible for themselves, but as they conduc to those ends: wherefore in all our Confutations we are to compare both those ends between themselves, and the effectue power or facultv of those things which lead to the produce to end. For as Aristotele rightly obverses, The arguments that excite us to action are of two sorts; either they are drawn from the good of the end, or from the possibility of obtaining it: which comparison hath these Three Rules, whereby we may be guided: First, If the thing in debate seem to have (in a moral esteme) an equal efficacy to good and to evil; then if the good we hope for somewhat more of good than the evil we fear hath of evil, we may adventure upon the action, (but if the conveniences be not able to over-ballance the inconvenience, it is better to refrains;) for a wife man, though never so daring and magnanamous, will not run the hazard of his life for every cause; but then only when the reward is great, weighty and honourable. The second Rule is this, If the Good and Evil seem to be equal which may proceed from the thing in question, then we may thus guide our choice; if the thing it self have a greater efficacy to produce the Good than it hath to produce the Evil, then we may chufe it. Thirdly, If both the Good and Evil seem unequal, and the power or efficacy of the things no les unequal; then that thing is at length to be chosen, if its efficacy to the Good be greater, being compared with its efficacy unto the Evil, than the Evil it self is, being compared with the Good: or if the Good it self compared with the Evil be greater, than its efficacy unto Evil being compared with the Good. Thus Nafs is to Beliarus, Where the dangers appear to be equal, and the damage alike if we err, there much discourse and confutation is necessary before we determine the matter in question; but where the difficulties are unequal, and the damages upon mistake greater or less than the hopes of gains, then the choice is very ease, and requires no great depth of judgment to determine. What we have fet down here somewhat more accurately, Cicero hath in a plainer way, but to the fame purpose described, where he advizeth us not to expose our selves to dangers without cause, than which nothing can argue a more fool-hardiness: Wherefore in perilous cafes we should imitate Physicines, who in little dillempers ufe gentle remedies; but when the diseafe threatens death, then thofe that are more doubtfull and dangerous: Therefore it is the office of a wife man to help in a time of danger, especially when he rationally conceives, that the good he shall reap by it, if it succeed, doth over-ballance the damage that he fears if it miscarry. But as the fame Cicero elsewhere faith, No prudent man will endanger himself in such an enterprise, wherein the good success shall bring him little profit, but where the least miscarriage may prove fatal. For as Dion Phrenesius faith, Grant that our grievances be unjust and unworthy to be born, yet will it not follow, That when ever we suffer any thing unjustly, we ought by striving againist it, to make our condition worse. To make use of iron and steel, when more gentle remedies may prevail, or where the case is not extremely dangerous, becomes neither a skilfull Physician, nor a Politick Statesman. Dion Phrenesius, When our burthens are beyond our strength, our endeavours to ease our selves of them are just and honest, because necessary; but if they are tolerable, and that we have cause to fear, that by strugling they may be made worse, we must arm our selves with patience. For as Arilides faith, Where our fears are above our hopes, then it concerns us especially to beware. An example whereof we will borrow out of Tacitus, who relates, that amongst the Cities of France, there arose a great debate whether were more desirous, Peace or Liberty: where by Liberty, we must understand that which is Civil, namely, a right to govern by their own Laws, which in a popular estate is absolute and full; but mixt and moderate in an Aristocracy, especially in such an estate wherein no Citizen is incapable of honours; and by Peace we mean such a Peace, whereby the destruction of a City or Nation by a cruel War may be prevented; that is, as Cicero explains it, When the whole City is in danger of being lost: or when the case of a Nation or City is fo deperate, that nothing but an utter desolation can otherwise with any probable reason be expected, which was the very case of the Jews being besieged by Titus. No man can be ignorant of Plato's Opinion in such a cafe, who preferred death before subjection; thereby shewing,

Quam fit non ardua virtus
Servitium fugiunt manus;

with what ease
A man from slav'ry may himself release.

But Right Reason suggetts the contrary; for the Life of Man, which is the foundation of all temporal blessings, and the occasion of eternal, is more to be esteemed than Liberty.
ty, whether we take both to be either personal or national: And therefore God himself intended it as an act of his mercy, that he delivered his people into captivity, but destroyed them not. And by the Prophet Jeremy he persuaded them, To yield themselves into the hands of the King of Babylon, lest they died by the famine or by the pestilence. It is a question not easily answered (Jnt St. Aug.) whether the Saguntines did well to preferve their Faith given to the Romans, so long, until the City with themselves was totally destroyed by Hannibal. For though Cicero thought nothing sufficient to justifie a War, but either the publick lity, or the publick Faith given; yet death he not there determine the case of the Saguntines, by shewing, that if a City were driven into such a strat, that they could not possibly preferve their Faith without the ruine of themselves; nor preferve themselves without the breach of their Faith (which was the case of the Saguntines) whether of the two were most eligible: But by the Authority of the Holy Scriptures we are taught, That death is the greatest of all torours, and that Captivity, whether of a Nation, or of some particular persons, is far more defidable than utter destruction. Thus Guido the Italian Poet belfpeak the Citizens of Milain,

Omnia serviri pro libertate servorum:
Sed libertatem co tempora memo late
Samus amat; necque enim certe focietatis cladi
Quam vitae quest, nisi cum ratione salutis,
Libertas amor, sed gloria tana putanda est.

Le is not so properly a love to liberty, as a preposterous itch after vain Glory, that makes a man to prefer his freedom before his life. Cicero infalltes this as a case of necessity, that the Chilinensis were necesarilly to give themselves up to Hannibal, although this cause were added to that necossity, Nisi mediant fame privae; Unless they had rather perishe by famine. For as Axanliai in Xenophons apologizeth for his surrender of Byzantium, being thereunto constrained for want of Bread, Pugnamendum est hominibus in homines, non in rerum naturam; Men ought to fight against Men, but not against nature; neither do men commend a voluntary death, so long as their hopes are above their fears. That sentence which Didotus Siculus passed against the Thebans, which lived in the time of Alexander the Great, stands yet upon record, namely, That they were the authors of their own ruin: as much as they had wish more courage than prudence provoked Alexander to their own destruction. And in another place, the same Author examining the ground of that War, which the Thracians undertook against Alexander’s Army, after his death, faith, That in the opinion of the wifest men, they had confifted well for their own glory, but not so well for their own profit, by thrifting themselves over-hastly into so dangerous an enterprise, being no ways urged therunto by any necessity; but especially being forewarned by the defecription of the Thebans. The like cenure doth Plutarch pause upon Cato and Scipio, Whom, for refusing to submit to Cæsar after his victory in Pharsalia, he condemns, as being the cause that sowry, and so gallant men, did unnecesarilly perish in Africa. Now what I have here faid concerning liberty, may likewise be faid concerning other things that are defidable, when they cannot be obtained without, if not a more jult, yet at least an equal expectation of some greater mischief. For as Aesflides faith, To preferve the ship with the los of the goods, is misera, but not with the los of the passengers.

This also is chiefly to be obserued, That Wars are feldom or never made for exacting punishments only, by such Princes or States as are of equal power; for as the civil Magistrate, fo he that undertakes to punish injuries by Arms, must always be presumed to be of power sufficient to enforce it: Neither is it prudence only, or the love we bear to our Subjects, that should disable us from a doubtful War; but sometimes even justice, that I mean, which is essential to Government, which requires, as obedience from inferiors, so protection and prefervation from superior. And consequently as fome Divines have rightly obserued, If a King for any small or trifing caufe, as for the exacting of punishments which are unnecesarilly, engage his Subjects in a dangerous War, he is bound to re- pare the loses they shall thereby suffe: for although to his Enemy haply he doth no wrong who hath jutly provoked him; yet doth he thereby wrong to his Subjects, by involving them in a dangerous War for such slight caufes, as might better have been diffimulated, and is therefore bound to repair their damages; in which fentt of that of Lyce holds true, Fustum est bellum quod necessarium est, & pin arma, quius nulla sit in armis retingimus pec; That War is just that is necessary, and Arms are there necessary, when there is no hope of safety but by Arms. This was Ovids with,

Ovid. Fæt. 1

Sola gerat miles, quibus arma coercet, arma;
May then the Souldier armed be,
When he repels his Enemy.

There
There is then one rare cause, when War either cannot, or ought not to be omitted; as namely, when (as Flor. speaks) "fama sunt armis fectione; Laws are more cruel than War itself; that is, when the oppressions of Tyrants are more grievous than the miliecies of War. He (S. Seneca) needs not to fear the miseries of War, that suffers the like, if not greater, living in Peace. So Aristotle, When it is manifect that our condition will be worse in sitting still, then we may adventure upon the dangers of War. Neither is it that opinion of Tacitus much to be condemned, where he faith, "That a miserable Peace may well be exchanged for a doubtful War; that is, as the fame Author faith, When, if we conquer, we enjoy our freedom; or being conquered, our condition can be no worse: Or, when (as Livy speaks) Peace is more grievous to those that fear, than War is to those that are free. But not (as Cicero puts the case) if it appear that being Conquered, we shall be prolbib'd, (i.e. our fclaves shall be fold, and our perfons banifhed; but being Conquergs, we change only our oppreffors, but are not eafed of our oppreffions.

Another time when War is to be preferred before Peace peace, is, when upon a rational debate we find that we have the beft Right, and which is of greatfelf moment, power, fufficient to defend it; that is, as Auguftus in Saxonimf sometimes faid^, Where there are more hopes of gain than fear of loss: Or as Scipio Africanus, and L. Aemilius Paulus were wont to fay of the Battel", We ought not to run the hazard of a Battel, but upon some unavoidable necessity, or upon great and manifefl advantage; whereas accordis of that Plutarch be before-redefted, To live with Steel and without very great necessity, neither becomes a good Phifician, nor a prudent State man. The like Zonaras records of Africa amm. Kings when they may lawfully enjoy Peace, ought not to make War. Whereunto we may add that of St. Aug. Thine. Pacem habere voluntatis effi. Bellum autem necessitatis effe debet, ut libenter nos Dei a necessitate, & conserva in pace; Peace we fhould make voluntarily, War out of necessity: That so God may relieve us in our necessitates, and preserve us in Peace. But then moft efpecially may we make War, when we have good caufe to hope, that our Enemies through fear, or by the fame of our Victories, will be ready to yield without any or very little danger on our part; and this is as Pliny caft it, the molt glorious of all Victories.

War indeed is, as Plutarch speaks an extremely faveing thing, and never comes unaccompanied with a torrent of mifchiefs and infolencies, (which f. Aug. * Should I undertake to delineate, when and where would my discourse end? But they may fay, a wife man will sometimes make War; as if, when he considers himself to be a man, he doth not much more greedily to find himfelf enforcing thereunto, though that War be just: for mifchiefes were just, there could be no neceffity to make War, it being in the iniquity of the adverfe part, that thrusts a wise man into a just and necessary War; which very iniquity as proceeding from men (though no neceffity of a War should thence arise) is to be lamented: whatsoever therefore, shall wiff any remorse, or good felves of War, cannot but confefl that it is ineffable, but that he can feel them, or think upon them without forrow, much more be that can glory in the fucces of them, Ideo fecutus benigni magna humanae perditiionem; Therefore think himfelf happy because he hath left all fentiments of humanity. So the fame Father in another place tells us, that Bellerophon are muthi infinitas felicitatis; bohinc neceflas; Good men make War, and their revenge, but wicked men make it their delight. And were there nothing of iniquity in the War, yet to enforce the glory of it to, that is in it ineffable, Eich Maximus Tyrannus: whereunto he adds, Wise men never make War but by conftantia, whereas fools fight for pleafure and gain. The Laws of the Romans in Diadromos, confidering the fame grefs of enmities and animadversions, likewife arise from War, thought themselves bound in duty, to declare before the Gods, and unto all good men, that they were not the Authors of it. Plutarch brings in some making this objection, But hath not Rome much improved her felf by War? Whereupon he answers, That true indeed the bath fo, in the opinion of those who place their greatest glory in Riches, in Pleafure, Wantonness, and Martial Power (which are but the dregs of Honour; but not in them who place their glory in the fafety of their People, in merueczę, jus, and contemtation. It was therefore worthily laid of Stephaneus the Phyfician unto Caesar King of Persia, To thee O King who art wholly conqueror in blood and flaughter, in subduing Kingdoms, and depopulating Cities, other glorious attributes may be due: but fyrly thou canft never hope by thofe ways to be efteemed good: for as no good man will greedily covet that which is another's: but Non elf homini homine propide utendum, as Seneca tells us; It is no point of Honour to be prodigal of human Blood. PhiloTem advised Alexander to be emolu- lous of Glory, but not by making himfelf like unto a Plague in depopulating Cities, and laying whole Kingdoms waste. Nothing can add more Glory to a King, than to provide for the fafety of his Subjects that they may live in Peace. Pliny after he had recounted fo many famous Battels, gained by the Dictatur C. Ceafar, wherein were fain (as he there com- puts) Eleven hundred Ninety two thoufand men, adds this, I do not reckon it as any part of his Glory, to have done fo great wrong to mankind howerever provoked. Philo in the life of Mafes obferves, That though the killing of Enemies in War, were by the Laws permitted: yet whatsoever did kill a man, though juftly, though in his own defence, though compelled thence to against his will, did notwithstanding contrab fame. guile untohimself, in refleét of that common

This document contains a mixture of Latin and English text, discussing the nature and consequences of war, including references to historical figures and philosophers such as Cicero, Seneca, and Plutarch. It reflects a philosophical discussion on the morality and necessity of war, contrasting just war with unjust war, and considering the consequences of peace and war for humanity and society.
For what Causes a War may be undertaken for others.

BOOK II.

Therefore expirations and purgations were thought necessary to cleanse them from that crime which seemed to be committed by them. If then, by the Hebrew Laws, He that killed a man, though against his will, was to betake himself to one of the Cities of refuge: And if God would not permit David to build him a Temple, because he was a man of blood, though of his enemies; that, is, as Josephus writes, because he had made many Wars, which by the Law was permitted: If among the Ancient Greeks, he that had slain a man, though accidentally, or in defence of himself, had need of expiation: Who cannot see, how unhappy a thing it is, and by all means to be avoided, voluntarily to engage our selves in a War, though haply not unjust? Surely among the Greek Churches, that most Christian Canon was long in force, whereby he that in what War ever had slain a man, though an enemy, was not by the space of three years admitted unto the Sacrament.

CHAP. XXV.

For what Causes a War may be undertaken for others.

I. That a War may justly be undertaken by a Prince for his Subjects.

II. But yet it is not always to be so undertaken.

III. Whether an innocent Subject may be delivered up to an enemy to prevent a War.

IV. That a War may justly be undertaken in the behalf of our Confederates, equal or unequal.

V. As also for our Friends.

VI. Too, and for any man.

VII. Yet may it also be omitted without blame, if it endanger himself, or cannot be done without the death of the invader.

VIII. Whether that War be just that it made to relieve another man’s Subjects, this explained by a definition.

IX. All those military confusions, and mercenary favours that respect not the equity of the Cause, are unjust.

X. To engage in War for spoil, or pay only, is wicked.

A

Bove when we treated of such persons as had a Right to make War, it was said and shewed, That naturally every man had a power to vindicate, not only his own, but the right of another; wherefore look what Causes do justify a War undertaken for our selves, the very same do justify a War made for another: But our principal, and most necessary care should be for our own Subjects, whether they be our Dome-

ricks, or such as live under our Civil Government, for they are a part of the Governor as we there shewed. Thus Josua we read made War in defence of the Gibeonites, who had yielded themselves unto him. It is not sufficient to denounce a Man Thal, that he wrongs no man, faith Procopius, unless he be also careful to protect those from injuries, who for that very end have put themselves under him. Our Ancients, faith Cicero to the Roman Senate, did often make Wars in the behalf of their Merchants and Mariners when they have been abused by Strangers. And in another place, How many Wars (faith he) did our forefathers undertake to revenge the wrongs done to the Citizens of Rome, when their Seamen have been imprisoned, and their Merchants spoiled? Yea, and the very same Romans who refused to take Arms in the defence of a People that were their Confederates, thought it necessary to defend the same People when they had surrendred themselves, and so became their Subjects: Thus do the Campanes befriend the Romans, Though ye refused to assist or defend us against our enemies, whilst we were your Friends and Confederates, yet now that we are your Subjects, you will certainly protect us. Whereupon Florus faith, That the Campanes made that League which they had formerly contracted with the Romans, more strong and inviolable by their voluntary surrender of all they had unto them; for it agreed not with the Faith of the Romans, faith Livy, to defeat such.

Neither is it prudence in a Governor to enter into a War always, though upon a just ground for any particular Subject, unless it may be done safely, without endangering all, or the greatest part of his Subjects. For it is the Duty of a good Prince to prefer the safety of the whole before its parts; and the greater the part that he provideth for, the nearer it draws to the nature of the whole.

Wherefore in case the Enemy fall require any one person to be delivered to death, though that person be innocent, there is no question but that he may be foraken, if it clearly appear, that the City is too weak to make resistance. For as Nicephorus, in Zorostes, advised rightly, concerning the delivering up of the Fugitives to the Bulgarian General, to purchase their peace, We judge it much better that a few men should perish, than that so great a multitude should be destroyed.
For what Causes a War may be undertaken for others.

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Non malo unius domus
Commune, vinci, sed nec aequari potest.

No one man's sufferings can equal be
Unto a general calamity.

(When Alexander had destroyed Thebes, he came to Athens, threatening to destroy it, un.

Pit. vit. Plut.-lefs Demophones, Lycurgus, and others, who had highly exasperated the people against him, were delivered unto him. Phocion therefore being urged in the Senate to deliver his Opinion in that Cause, pointing to his dear friend Nicocles, answered, Eo in fortunam urbem nolvi se perdiremunt, et etammi bune Nicoclem meum dedi Alexander potest, dedi suferitas sui, Into such a desperate condition have these men brought this City, that if Alexander had demanded my dearest friend Nicocles, my Vote should have past for his delivery: Yes, and I should think my self happy, might my life alone be accepted, as a sacrifice to preserve it.) It is true Vlastis seems to be of a contrary judgment, yet he that throughly weighs not so much his words as his intention and purpose, may perceive that all he aims at is this only, That such an innocent person is not rashly or easily to be delivered, where there remains any hopes that he may be defended. For he there brings in a story of a certain Band of Italian Foot, whom he defeately condemns for defecting Pompey before his Cafe was desperate, upon Cesar's promis of safety and protection which he condemns, and that not unworthily. But whether an innocent Citizen may be delivered up into the enemies power to preserve his City from imminent ruin, is much disputed now amongst the learned, as it formerly was, when Demophones invented that notable Apologue of the Wolves, who were content to make peace with the sheepe, upon condition that their Dogs might be delivered up unto them. Neither doth Vlastis only deny this, but Sesto alfo, whose Opinion Vlastis condemns, as being too near a neighbour to treachery: Yet Sesto was of Opinion, that such a Citizen ought to deliver up himself, which Vlastis denies, being move by this reason, because the nature of a Civil Society, which was at the first erected into for mutual prefervation, doth not permit it. But the force of this argument reacheth no farther than this, That no Citizen is bound to do by any right strictly taken; but it argues not, That if he do it, he tranfgreffeth the rules of Charity: For there are many Duties, which though not by the strict rules of Justice, yet by the bonds of Charity we stand obliged to perform, which are not only laudable being done, (as Vlastis acknowledgeth) but which cannot be left undone without blame; whereas this is one, That every man prefers the faiety of an innocent multitude before his own. Know ye not, faith Cauphas the High Priest, that it is better, that is, less evil, that one man should die, than that the whole Nation should perish. For the destruction of no one Family can equal the destruction of the Universe. A particular mischief is much more tolerable than a general calamity; And therefore Phocion did wisely when he perfwaded Demophones, rather to undergo death himself, than that for him his Native Country should be destroyed; which he urged upon him by the examples of the Daughters of Lens, and of the Pythaindeis. This was Ceere's resolution in the like case, as appears by that Oration he made for P. Sextus, If it should happen, faith he, that falling in a ship with my friends, and being therein assailed by many Tyrants, who peremptorily resolved to sink the ship, unless I only were delivered up unto them, I should choose rather to cast myself into the sea to preserve my friends, than endeavours to preserve mine own life with the danger of theirs: And so in another place, An honest and a prudent man observing the Laws, and knowing the duties of a Civil Life, doth Debaib. 3. always prefer a general good before the advantage of any particular person, though of himself. Loy speaking of certain Molajians, faith, That he had often heard of men that willingly exposed themselves to death for the defence of their Country: But these, faith he, are the first that ever I heard of, that thought it fit, that their Country should perish for themselves only. But here alfo it may be questioned, whether a Citizen (though obliged in duty to do it) may be compelled thereunto. This Sesto denies, by the example of a rich man, that is bound by the bonds of mercy and charity to administer to the necessities of the poor, yet cannot be compelled thereunto. But we must here note, that there is not the fame reason, for the parts compared between themselves, as there is for the Superiors compared with those that are subject unto them; for equals cannot compel one another, unless it be to such things as are strictly due; whereas it is in the power of Superiors, as Superiors, to enforce their inferiors to any virtuous act, for the publick good. So we read, that the Lucans ordained a punishment against Prodigality, the Macedonians against Ingratitude, and the Athenians and Lucans both against Idleness. As in a time of dearth, any one Citizen may be enforced to produce his private store of Grain, and to make it publick: So in this case, whatsoever Charity requires of us, the Magistrature for a more universal good hath a power to enforce; as Phocion would have delivered up his friend Nicocles had Alexander demanded him.

Next
IV.

Next unto our own Subjects, or rather equally to be defended, are our Confederates, whether they surrender themselves upon condition of protection, or whether it be covendanted for mutual aid and assistance: *Quis non repellit injuriam a sociis potest, tam ei in vino quam ille qui��it?* He that defends not his Associate when it is in his power, is as blame-worthy as he that injures him. Yet are not such Covenants to be so far extended, as to engage us in a War if there be no just Cause. Wherefore the Lacedemonians before they had made War against the Athenians, referred the justice of their Case to the judgment of all their Confederates. So did the Romans before they began their War against Nabir, make the Grecian Cities Judges in their case. So Simler concerning the Commonwealth of the Switzers, If the Lord shall make War against any man, and it be known that his cause be just, or if it be doubted whether it be so, the Vassal shall be bound to assist his Lord; but if it be manifest that the War is unreasonable, then is the Vassal bound only to defend his Lord, but not to offend another. Whereunto we may add, That though the case of our Confederates be just, yet if his case be depreate, and that, though we should assist him with what forces we can, there are no hopes of a good end; we are not then bound to aid him, because all alliances were at first made for pretention, but not for destruction; yea, and we may defend one of our Confederates against another of our Confederates, unless we be by any Article in a former League, particularly forbidden it. Thus the Athenians might have defended the Corevians, if their Cause had been just, against the Corinthians their more ancient Associates.

V.

Next to our Confederates, our friends are to be assisted, to whose aid, though we stand not engaged by any League or promise; yet upon the score of common friendship, we ought to contribute towards their assistance, if we may do it with ease, and without any inconvenience to ourselves. Thus Abraham took up Arms in defence of his Kinfman Lot. And thus the Romans farbad the Pirates of Antium, to rob the Grecians their Friends and Kinfmen. And thus we often read it of the same Romans, that they frequently either made War, or at least threatened so to do; not in the behalf of their Associates only, to whom they folidly owed, but for their Friends and Neighbours also, upon no other account, but that of Love and Friendship. There is an old Oracle that serves to guide us in this case,

Non opus juvasti: praebas in morte sodalem:
Effulor ibi mil, nifi, Templi simus ezi.

VI.

Lastly we owe our assistance to all mankind, by reason of that near conjunction that there is between us, which alone were sufficient to excite us to aid and to succour each other.

Homo in adversitatem mutum generatur efi; Men (faith Seneca) are born to help each other: And again, A wife man will as oft as he can, prevent misfortunes: According to that of Euripides,

What Beasts from Ryck, Servants from Altars have:
Cities differ, the like from Cities crave.

And indeed, That fortitude that defends the cause of the weak and innocent, is full of justice, faith St Ambrose; but of this we have treated above.

Here also it may be questioned, whether for one man to defend another, or for one People or Nation to protect another from violence and wrong, be a debt wherunto we stand bound. *Plato in the fourth of his Laws affirms, That he doth not repel violence offered to another (if he can do it) deserves to be punished. The like provision was made, both by the Hebrew and Egyptian Laws*; but this general will admit of some exceptions: for in case we cannot do this, without incurring some manifest danger unto our selves, it is most agreeable to nature that we abstain from attempting it; for every man may prefer his own before the welfare of another. And in this sense doth that of Cicero hold true, He that doth not defend another, nor resists an injury when he can, is as much to blame, as he that deferts his Parents, his Country, or his Friends; if he can, that is, with safety to himself: For he himself in another place admits, That some, happily, may be left unprotected without blame. Salusto in his History gives this wholesome advice, *Let them, faith he, who, in being in profperity, are about to engage themselves in a social War, seriously consider, First, Whether they may then live in peace; Next, Whether the War they engage in be just, safe, honourable; or otherwise, inconvenient. Succuram perituro, sed ut ipse non peremur; I will defend him (faith Seneca) that is ready to perish, but go, that I thereby perish not myself, unless it be to refrain from death some person of great worth, or to purchase some very great advantage unto either my self, or my relations: Bonum etiam impendii languinis mei tuerebor; A good man, faith he, though with the hazard of my life, I shall defend; and if I can rescue a bad man from Thieves, by my clamour and outcry, I shall willingly strain my voice to do him good. But yet if that good man be so oppressed, that he cannot be relieved without the death of the oppreffer, I am not bound
War may be undertaken for others justly.

bound to do it; for if what I have said above be granted, namely, That the case may so happen, that the person invaded may chuse rather to dje himself, than to be the death of the invader: He that doth believe, the invaded doth with, or would chuse rather so to do, doth not sin, if he do not refuse him; especially when the damage that is likely to befall the invading party, is in all probability likely to be both irreparable and everlasting.

Another Question is sometimes started, Whether that War be just which is undertaken to free another's Subjects, from the oppression of their own Prince: without doubt, as soon as civil societies were at first instituted, every Governor had some peculiar Rights over his own Subjects, according to that of Euripides:

\[\text{VIII. Whether a War may be made upon another King for oppreffing his own Subjects.}\]

\[
\begin{align*}
\text{Nor can the Gods, each others Acts refund.} \\
\text{So likewise Euripides,} \\
\text{The Gods their custom have,} \\
\text{None must oppose what any one did crave:}
\end{align*}
\]

That is as St. Ambrose well expounds it, \textit{Left by usurping upon each others jurisdiction, they should stir up War amongst themselves.} That every State should be permitted to punish their own Subjects, was thought by the Corinthians in Thucydes to be just. And Persee in his Oration to Marcus, denies that he needed to make any defence for himself for what he had done against the Dolopes, saying, \textit{Jure secuti meo, I did but exercise mine own just Right, seeing that they were my Subjects, and so under my jurisdiction.} For as St. Augustine observes, \textit{There is not the same reason, that because it is an Argument of some mens goodness, to confer courtesies on strangers, therefore it should be the like argument of their justice, to punish those that belong to another's jurisdiction.} But rather as Procopius hath it, \textit{It is more agreeable to the rules of equity, that every man should carefully govern his own Province, and not trouble himself with the affairs of others: Yet are all these to be understood of such cases, wherein another mans Subjects have manifestly offended, or at least whereof it is doubtful whether they have or not; for to this end were Empires at first distributed: But they hold not in cases Subjects apparently groan under such Tyrannies, as no just man can approve of; and therefore are precluded from those Rights that are common to humane Society. For in such a case as this it was that Consantine made War against Maxentius and Licinius; and other Roman Emperours against the Persians, or at least threatened so to do, unless they protected ed from oppression such of their Subjects as were Christians, being perfecuted for no other cause but that of Religion. Yea, and although we should grant that Subjects could not I i juftly
War may be undertaken for others justly.

BOOK II.

Justly taken up Arms against their Prince; no, not in case of greatest necessity (which we see is doubted, even by them, whole purpose it was to defend the Regal Power): Yet will it not thence follow, that other Princes may not take Arms in their own defence. For whensoever the impediment to any action is merely personal, and not drawn from the thing itself, then that which is unlawful for one to do by himself, may yet be lawful for another to do for him, if the matter be such wherein one man may profit another: So a suit at Law which a Pupil, by reason of his minority cannot maintain by himself, his Tutor or Guardian may maintain for him. So a Client that cannot appear in his own person by reason of the distance of place, may notwithstanding appear by his Attorney. Now that impediment which in a Subject hinders resistance, ariseth not from the Caufe which is the fame in Subjects, as in those that are not; but from the condition or quality of the person, which palieth not into another. Thus thought Seneca, He that is separated from his country is vacatious to his own, may be justly by me invaded, as I have shewed before where we treated of punishments, which thing is often joined with the defence of innocents. Although we are not ignorant by these many examples we find in Histories, both ancient and modern, That Ambition, and an inflatable thirst after Gain, do too frequently disfigure themselves under such specious pretences; yet may we not thence conclude, that because wicked men do sometimes usurp this Right for sinister ends; therefore to defend other mens Subjects from manifest oppression, caufeth to be lawful. For, Navigat or Pirates, ferro humor & Latrones; Pyrates we see navigate the Seas, and Thieves wayward: yet no man will hence infer, That it is not therefore lawful for Merchants to traffic by Sea, or for Princes to make use of Arms to defend their Subjects.

But as thofe Warlike Confederacies, which are made to the end that succours may be promised upon any War, undertaken by whomsoever, or upon what occasion for ever, be it right or wrong, are already declared to be unlawful; so is there no kind of life more wicked than that of mercenary Souldiers, who without any respect had to the equity of the Caufe, fight only for plunder and pay; to whom, Ibis fac, nbi pharina mercenes: That is the beft Caufe which pays beft, which Plato proves out of Tyrants. This was it that Philip, uproving the Eòlians with, and Diumphius Athenes condemned in the Arcadians, in these words, Belli insigniatur mundum; They made War a trade to live by: And, what was the common bane of all Greece besides, was matter of gain and profit to them, whilst they sent out their mercenaries, sometimes to this part, sometimes to that, without any regard to justice or equity, Surely a Souldier is a thing to be much pitied, who as Antiphanes speaks, hires himself to be killed, to preserve a life that is miserable. So Dion Phræfæs, What can be more necessary, what more dear and precious than life? and yet even this, many men imprudently lose for greatness of gain. This was Plautus his Character of mercenaries, Suam qui auro visin veniant; Their lives for gold they fell: The like doth Gunther,

Aedato condulta cohoris, & bellica miles
Donis sequent, prebique saum materæ favorem
Seuat, & accepto partir communer eildo
Hanc habemisse, datore preti quem jefferit, hostem.

And yet, did they fell their own lives only, it were the left hurt; but together with their own, they fell the lives of many innocents, Tanto carnisse detestabiliores, quanto peius eft fine causa, quam cum caufa occedere; By so much is the condition of such Souldiers worse than that of Haugnes: by how much, it is more abominable to kill the innocent, than to destroy the guilty: As Antiphanes was wont to say of Tyrants, That they were more cruel and merciless than common Executioners; for these hang Thieves and Marthaters only, but those marther innocents. And Philip of Macedon, as truly of those who made War for gain only, That War was to them as Peace, and Peace as War. So likewife Seneca, What may a man call this but madness, to make dangers our inseparable companions, fiercely to assault those whom we know not, to be engag’d without any cause, to destroy all we meet, and like wild Beasts to kill those whom we never knew? Surely War is not a trade to live by; nay, it is a thing in it self so horrid, that nothing but pure necessity, or perfect charity, can denominate it just or beneficent. So St. Augustine, Militare non eft delictum, sed præter præsum militare peccatur eft: Simply to make War is not sinful, but to make War for plunder and pay only, makes need be wicked.

Nay to make War for pay or hire is likewise a sin, if that be the only or principal thing we aim at; though otherwise to receive pay for our pains, when we are lawfully called to fight, is altogether lawful: For who, faith St. Paul, goes to War at any time upon his own charge?
CHAP. XXVI.

How War may be justly waged by such as are Subjects to another Command.

I. Who they are that are under the dominion of another.

II. What they ought to do being admitted to debate, or being left to their free choice.

III. If they think the cause unjust, though commanded, they ought not to make war.

IV. What they ought to do in case they doubt the justice of the Cause.

V. If they cannot be satisfied, their persons are to be spared, but their Taxes heightened.

VI. In what case Subjects may justly take Arms in an unjust War.

Hitherto we have treated of such as are free, and have power to dispose of their own actions. There are others that are under more a servile condition, and such are the Sons of a Family, Servants, Subjects, and each particular Citizen, compared with the whole Body of the City whereof they are.

But these men, if either admitted to advise, or left to their own choice, whether they will either take up Arms or be quiet, ought to be guided by the same Rules, which are already set down for those who being free have power to make war either for themselves or others.

But if commanded therunto, as usually they are, then if it be evident unto them that the Cause is unjust, they ought altogether to forbear; for that God is rather to be obeyed than man, was not only the judgment of the Apostle, but even of Socrates also, as Plato testifies in his Apology. So also thought the Hebrew Doctors, namely, That Kings, if they command any thing contrary to Gods Laws, were not at all to be obeyed. For this Josephus records of his Country-men, who were being convicted before Herod for pulling down the Roman Eagle, which he had caused to be erected over the Great Gate of the Temple at Jerusalem, and demanded how they durst do it, returned this Answer, What we have done, we did in vindication of Gods honour, and of that Divine Law whereof we profess ourselves to be the Disciples; neither hast thou cause to wonder if we hold the Laws which Moses delivered unto us from God himself, to be more sacred and indispensible than thy Deceases. Neither do we refuse to suffer death, or any other punishment thou shalt think fit to inflict upon us; as knowing that we shall not suffer as Malefactors, but as Martyrs in a good Cause. That excellent Saying of Polycarpus, now ready to expire, lives still upon Record, namely, To Princes and Potentates we owe all due honour and obedience, yet not so as thereby to endanger our eternal salvation.

It was the advice of St. Paul, Children obey your Parents in the Lord, Eph. 6. 1., for this is right; upon which words St. Hierome thus glosseth, For Children not to obey their Parents, is a sin; but because Parents may hardly command that which is unlawful, therefore he adds, in the Lord. And St. Chrysostome thus expounds them, Children obey your Parents in the Lord, that is, in all things whereof you shall not displease God. And in another place he saith, For it is no small reward that God proposeth to us for our obedience to Parents (and faithful Magistrates.) For we are commanded to esteem them as our Lords, and both in words and deeds to yield them all due obedience; yet so, as the works of true piety and devotion are not thereby hindered. But if thine obedience unto God call thee forwards, then that of St. Hierome holds true, (which he speaks declamatorily out of Seneca) Per calcem porgea Petren, Thou must go on, though thou transpleas on thine own Parents. For our obedience unto our Parents cannot jutifie our disobedience unto God. For as the same Apostle faith, Every man shall receive from God according to his own works, whether bond or free. The like advice doth St. Hierome give unto Servants, where he addes, But when our carnal Lords shall command any thing contrary to the will of him (who is the God of the Spirits of all Flesh,) then they are not to be obeyed. Again, in another place, In these things only are men subject unto their Lords and Masters, which are not contrary to the Command of God. So likewise Chrysostome, Servants also have their bounds and limits prescribed them by God; and how far they may go in their obedience, is also commanded, beyond which they must not proceed. If the Lord command us nothing that is by God forbidden, he is to be followed and obeyed; but not beyond. The like advice gives Clemens Alexandrinus concerning a Wife, Let her, faith he, obey her Husband in all things, and do nothing against his will, but what the believers may very much conducive to virtue, and her own salvation. So likewise Tertullian, We are sufficiently instructed (faith he) by the Apostles Precepts to be subject to Magistrates, Princes, and Powers in all obedience. Sed intra limites Disciplina, So far as they transfer not the Rules of Christian Discipline. The like we read of Sileanus the Martyr, We therefore desist the Roman Laws,
left we should thereby transgress the Divine Laws. And Mosioinus, If a Son, a Servant, or a Subject, shall refuse to yield obedience unto either a Father, a Master, or a Prince in such Commands as are impious and ungodly, they shall not be accounted as disobedient, injurious or wicked. Now as the obedience of Servants is bounded by the Divine Laws, so is that of Children to Parents. Antonellus Gellius approves not of this opinion, That a Father is in all things to be obey'd. For (faith he) what if he command his Son to betray his Country, to kill his own Mother? &c. Therefore the middle way is best and safest: in some things we must, in other some we must not obey. So Seena the Father, Non omnibus Imperii parentem est, All Commands oblige us not unto obedience. So Quintilian, There is no necessity that Children should execute all their Parents Commands; for there may be many things, which, though commanded, may not lawfully be done. As if a Father command his Son to give his Soffrage, or to pass a sentence contrary to his own judgment, or to bear witness to that whereof he is ignorant. If my Father command me to burn the Capitol, to perfecute my self of such a Fort or Castle, I may lawfully answer, Those things I must not do. So in another place, We are not to execute all our Parents Commands, for other wise nothing would be more destructive than benefits received, if they oblige us unto all manner of servitude. To the same purpose is that of Seeca, Neither can we command all things, nor can our servants be compelled to obey us in all our Commands: Contra Rempublicam Imperiata non facient, They will not obey us if we command them any thing against the Commonwealth; they will not, though commanded, put their hands to any wickedness. Of the same opinion was Sopater, A Father (faith he) is indeed to be obey'd, if his Commands be according to Law, it is true; but if other wise, it is not convenient. To justify Subjects for refusing to execute the wicked Commands of their Princes, we have divers examples in the Sacred Stories. Saul commanded his Guards to fall upon the Priests at Nob, but they would not put forth their hands to fall upon the Priests of the Lord, 1 Sam. 22. 17. Abab at the instigation of Zeezel perjured the Lords Prophets to death; but good Obadab preferred a hundred of them, and fed them by fifty in a Cave, 1 Kings 18. 4. Ahab's Commands a Captain and his Fifty to apprehend Eliah, only for pronouncing that Sentence which God pass'd against him; Eliah not only refus'd to come down, but to vindicate his Commission, commanded fire from Heaven to consume the Messengers, 2 Kings 1. 10. In our Christian Stories we find Manzel and Georgius highly commend'd, for refusing to be instrumental in the murder of Augustus. And in Prophane, we have likewise two notable Examples of such who have refus'd to obey their Princes in their unlawful Commands; the one of Papinianus, that great Lawyer, who being command'd by Caracalla to justify as well as the people the people, the Paracide he had committed upon his own Brother Geta, readily answer'd, That it was not so soon justified as done; and for his refus'd suffer'd death. The other of Heliodorus, both recorded by Ammiatius and Marcellinus; whereunto we may add that of Severus, who would have no man exempted from punishment that should dare to take away the life of a Senator, (extrajudicially, as i suppose) though at the Emperors Command. Strategel was worthily disdier'd among the Athenians, for but offering at a Law, where by whatsoever should pleae King Domestium, should be reputed as pious towards God, and just amongst men. Pliny in his Epistle to Minucius labours to make it appear, That the very ministry or execution of unlawful commands is sinful. For as Tertullian speaks, Plus caditur qui jubet, quando nec obsequitur qui execurit; Surely he that command's things unjust is severely punishable, when he but that executes them cannot be excused. Those Civil Laws which do easily pardon venial sins, are also very favourable to those who are inform'd either to sin, or to disobey; and yet they are not favourable to all alike. For where the crimes are foul, and such as Nature by a secret instinct seems to abhor, they shew no favour at all. But where the offence appears not to he heinous, by any natural interpretation, but by Logical inferences may be proved to be so, there they wisely vouchsaf'e pardon. Josiphus relates, That the Jews that serv'd under Alexander the Great could neither by fives, nor any reproachful words, be incourag'd to carry Earth, or other materials, at the rest of the Soulsiers did, towards the repair of the Temple of Belus, which was in Babylon. But examples more pertinent to our purpose are the Theban Legion, whereof we have already spoken; and the Souliers that serv'd under Jolian, whereof S. Ambrose speaks thus, Though the Emperour Julian were an Aposolate, yet had he many Christians that serv'd under him; to whom if he had said, Draw out for the defence of the Commonwealth, they would instantly have obey'd; but if he should have said, March out against the Christians, tune agnocecent Imperatorcem Celi, then they would have acknowledg'd no King but the King of Heaven. The like we read of those Executioners, who being convert'd to Christianness, chose rather to dye themselves than to execute the Sentence of death pronnounced against Christians. Now the Cafe is the very fame, whenever any man is persuad'd that the thing commanded is unjust; for to such a man it is so long unjust, until he can be convinc'd that it is otherwise.

But what if he be in doubt whether it be lawful or not, is he to suspend, or to obey? The most receiv'd opinion is, That he must obey. Neither should he be flarted at that notable
Chap. xxvi.

Subjects to another Command.

notable Saying, _Quod dubitas, ne feceris: forebear if thou doubtst._ For he that contemplatively doubteth, may, as to his practical business, not doubt at all; because he may be confident that in doubtful Cases he is bound to obey his Superiors. And indeed that this distinction of a twofold judgment is of necessary use in many actions, it cannot be denied. The Civil Laws, not only of the Romans, but of other Nations, do not only demine obedience in such a Case, but will admit of no civil action against them that do it in obedience. _Many Magistrates_ (faith St. Chrysostome) _we have heard of, who being accused of unjust murders have been punished. But no man ever questioned the Executioner, or made inquisition after him; for the necessity of obeying his Superior, makes his fault excusable._ Is damnation dat qui jubet dare; _He, lay the Lawyers, gives the damage that commands it._ And again, _Eius were nulla culpa est, cui parere necesse est;_ Neither can the fault be properly his, who being commanded must obey. And again, _Necessitas postestatis excusat; That which is enforced on us by a power above us, is pardonable._ Aristotle himself, among those who do unjust things, but not unjustly, reckons the Ser vant of a wicked Master. For he is said to do unjustly from whom the action doth originally proceed. Now because in a Servant there is no full deliberative power; therefore the Servant, though he do that which is unjust, yet in doing that only which he is commanded, he doth not unjustly. According to that Proverbia! Saying, 

_Dimidia virtute caret servire contius;_ He wants one half of goodness that must serve.

And that also, 

_One half of humane reason God withdraws_ From those who live under another's Laws.

And that which _Philo_ makes use of, 

_If serve thou dest, what's reason unto thee?_ 

_Uphian out of Celsus faith, Servum nihil deliquisse, qui Domino jubenti obedire videt;_ The Servant is not to blame, whilst he doth but what his Lord commands him. So in another place, _Velle non creditor qui obegetur Imperio Patris vel Domini; It is not believed to be his own act, if he do it in obedience either to his Father or Master._ _Athiropistes_ freely differs't the Servants of _Attalus_ without any punishment at all, though they were found guilty of the murder intended upon him. Neither would he punish the Children of those that bad rebelled against him, because they were compelled to Rebellion by the Commands of others. _Themisthnes_ in his Ninth Oration observes, and that truly, _That Princes have always, the resemblance of reason, as Souldiers the lig of anger._ The like is observed by _Tacitus,_ God hath allotted unto Princes the faculty of judgment, but unto Subjects he hath left only the glory of obedience. And as the same _Tacitus_ relates, _The Son of Pilo was by Tiberius acquitted of the crime of sedition, because what he did was by his Fathers command, whom he durst not disobey._ _Servus herilis Imperii non Cenfor est, sed Minifter; The Servant is not to sit as Judge of his Masters Commands to dispute them, but to obey them._ But in this case of War let us hear what _St. Augustines_ faith, _If a good man shall happen to war under a King, though sacrilegious, he may, being commanded, fight with a good confidence; if obeying the order of his Countries peace, he be either assured that what he is commanded is not repugnant to the Law of God, or doubtful whether it be or not; so that happily at the iniquity of the command may render the King guilty, so the necessity of obeying those commands for Orders false, may likewise render the Souldier innocent._ And again, _If a Souldier under lawful Command shall in obedience therunto kill a man, by the Laws of his City he is free from murther; may, unless he do it, he shall be held as a Traitor to his own Country._ But if he shall do it of his own accord, or without command, he shall be guilty of murder. _That very Law that will punish him if he do it without command, will likewise punish him if he do it not being commanded._ And from hence arbiteth that fo generally received opinion, I mean as to Subjects, That a War may be alt on both sides; that is, in respect of them it may be on both sides void of injustice, whereunto the Poet had respect when he said,

_Addition. 5._ 

_In justum facient sed non injuftum._
Yet is not this opinion so generally received, but that it meets with some difficulty. For Pope Adrian defended the contrary, which may be confirmed not by that Argument particularly which he urges, but by this, which seems to be more forcible, namely, That he that doubts contemptuously, ought in his active judgment to choose the safer part, which is, To abstain from War. The Emissi are highly commended, for that amongst other things they bound themselves by Oaths, To hurt no man, though they were commanded. In imitation of whom the Pythagoreans did wholly abstain from War, as being the Ringellander to description, commanding murder as by a Law. Neither will it much avail to say for the other opinion, That it is dangerous to disobey: For whilft both are uncertain, (for if the War be unjust, it is no act of disobedience to avoid it) he is not to be blamed that chooseth the safer, but our disobedience in such things hath in its own nature less of evil than murthly, especially of so many Innocents. It is flourished by the Ancients, That when Mercury (being accused for killing of Argus) excused himself, for that he did it at the command of Jupiter, the rest of the Gods, notwithstanding, durst not acquit him: No more doth Martial Pothinus, an Officer of Mark Antony's, when he faith,

Antoni temen elf pejor, quam Causa Pothini: He facinus Domino prafuit, ille feli.

Worse than Pothinus's Cause is Antony's;
This for himself, that for his Lord doth dye.

Nor will that be of much greater moment which some men urge to the contrary, namely, That in case we admit that every private person may have liberty to judge of the justines of the War, and accordingly either yield or deny their obedience, the Commonwealth would soon be destroyed; because for the most part it cannot be expedient for the State, that the reasons of their counsels should be communicated to the Vulgar. For although this may be true where the caues of the War are manifest only, yet not where the War is justifiable; for there the caues thereof should be published unto all, that every man may judge of them, and be satisfied in them. What Tertullian sometimes said, perhaps too confidently, of Laws in general, may very appropiately be said of the War; No Subject so faithfully observes a Law, as he that knows the reason of that Law. For every Law ought to give testimony of its own integrity, to those from whom it requires obedience. On the contrary, Subjecta Lex eft, quæ probatis non vult; improba f non probata, dominat: That Law that will not endure the true, is held suspect; as that which being disapproved, yet exigis obedience, is held as wicked. Thus when Ulysses endeavoured to persuade Achilles to join with the Grecian Princes in a war against the Trojans, Achilles urgeth them to declare the caufe:

What cause Greece hath so great a War to wage, Declare, whereby thou mayst enforce our rage.

And hence it is that Thesius in the fame Poet thus encourageth his Souldiers, Go, and fight boldly in a Cause so just.

For as Propertius well observ'd, The justice of the Cause cannot but heighten the spirits and inflame the indignation of a Souldier, whose courage drops so, that he grows ashamed of his Arms when his Cause is sought. Herod in his Oration to the Jews, after the slaughter in Arabia, thus he speaks then, I am willing to show you how justly I have undertaken this War, being provoked thereby to the reproaches of our enemies; which being known unto you, must needs heighten your courage to a revenge. It is very often verified what the Panegyrist observ'd, So prevalent, even amongst Armies, is a good Confidence, that the Victory seems properly to belong, not to the numbers or valour of the men, but to the justness and equity of the Cause. And if some Learned Men have interpreted that of Gen. 14. 14, as if Abraham had before the Fight instructed his Servants fully in the justice of his Quarrel. And certainly the denunciation of War ought to be publick, and the caufe expressed, that the whole Race of Mankind may judge of the equity of it. Prudence indeed, as Aristotele notes, is a Virtue proper to Princes; but Justice belongs to men as they are men. And therefore the reasons of their counsels as Princes are not to be communicated, but the reasons of their actions as men may be proclaimed. These things considered, we conclude with Pope Adrian, That where the Subject doth not only doubt the lawfulness of the War, but by very probable Arguments is induced to believe that it is unjust, especially if that War be offensive, and not defensive; he is bound to abstain. Nay, very probable it is, That the Executioner, whose Office it is to execute the penalty of the Law upon a condemned Malefactor, should be thoroughly informed in the merits of his Caufe, either by being present
at the whole Tryal, or by hearing the confession of the person condemned; that so he may be convinced that he whom he puts to death, hath by the Law deferved it, which in some places is observed. Neither can there any more probable reason be assigned for that Hebrew Law, whereby it was provided, That when a Malefactor was to be floned, the Witness should go before the people, and call the firft flone at him. And for this Cause it was that the Kings Guards refused to fall upon the Priests of Nob at Saul's command, being throughly convinced both of the fanciety of their Order, and of the equity of their Caufe. And for this very reason it was, that the third Captain, being bent by Abesiah unto Elijah, would not lay violent hands upon him. And for the fame reason it was that many publick Executioners amongst the Jews, being converted to Christianity, renounced their Offices, as being very dangerous; if we may give credit to the Martyrology, and to venerable Bede.

But in caufe the Subjects minds are not satisfied concerning the equity of the Caufe by their Princes Declaration, then 'tis the Office of a good Magiftrate rather to impose some extraordinary Taxes upon them, than to compel them to serve him in his Wars unfatisfied especially when he may be supplied with men otherwife. Now whether these Soul'diers do serve him with a good or evil intention, is no matter; for a good Prince may make use of both, as God himself doth of Satan and his Disciples, as instruments to bring about his own most Sovereign purpose: or as a poor man may and doth make use of Jews and Extortioners to supply his proper wants, and that without sin. Nay, though there be no doubt of the lawfulness of the War, yet it is not fit that Christians should be compelled to fight against their wills; seeing that to abstain from War, even then when it is in itself lawful, hath always been required of Church-men and Penitentials to preserve them in the greater sanctity, and is, in all others, many ways commendable. When Caesar upbraided the Christians for refusing to go to war, Origen apologized for them thus, To those who being Unbelievers would enforce us to fight for the Commonwealth, and to destroy men, we shall give this Answer, That even their own Idol-Priests, and those that attend upon the service of their reputed God, do keep themselves unainted with humane blood, that so they may offer up their Sacrifices for the whole Nation with clean and unpolluted hands: Neither in caius there should arise a War, are those men to be lifted in their Armies. And if this be not done without reason, how much more may they be said after their manner to fight, who being Priests to the Most High God, endeavour to preserve themselves free from blood and rapines; that so, whilst others are polluted with spolit and slaughter, they may wrestle with God himself by constant and incessant prayers for the welfare of them that make war unjustly, and for the safety of them that govern righteousiy. Wherefore Origen calls all Christians Priests, by the example of the Holy Scriptures.

But yet I believe that a Caufe may so fall out, that in a War not only doubtful, but manifestly unjust, it may be jut for Subjects in some measure to defend themselves. For seeing that no enemy, though prosecuting a just War, can have any true and internal right to kill such Subjects as are innocent, and no ways accesseful to the War, unless it be either for necessary defence, or by consequence, and not intentionally; (for such Subjects are not liable to punishment) it follows, That if it evidently appears that the enemy comes with a full purpose not to spare the lives of such hostile Subjects, when with safety to himself he may, then those Subjects may by the Law of Nature defend themselves; which right neither doth the Law of Nations take from them: neither will we lay, That such a War is on both sides lawful; for we dispute not here concerning the legality of the War, but of a certain and determinate action in the War, which action (though it proceed from one that otherwise hath a sufficient right to make war, yet) is unjust, and may therefore be justly repelled.

The End of the Second Book

BOOK
Hugo Grotius

OF THE

RIGHTS

OF

WAR and PEACE.

BOOK III.

C H A P. I.

Of certain General Rules, shewing what by the Law of Nature may be lawful in War, wherein also he treats both of Fraud and Lies.

I. The order and method of the Book following.
II. The first Rule; whatsoever is necessary to the end is lawful in War, explained.
III. The second Rule; A Right in War may arise as well from Causes subsequent, as from the beginning of the War.
IV. The third Rule; that in War, some things may be done indirectly without injury, which if by themselves, and intentionally done, were unlawful with a caution.
V. What may lawfully be done to such as supply the enemy with things needful; this explained.
VI. Whether in War Fraud be lawful.
VII. That Fraud in its negative act is not of itself unlawful.
VIII. Fraud in its positive act is either by such outward acts, as admit of several constructions, or by such signify as it were by arguments; fraud in the former sense lawful.
IX. Of that in the latter sense, the question is difficult.
X. The use of words in another sense than that wherein we know they are understood, not always unlawful.
XI. The form of a Lye as it is unlawful, contrary to the repugnancy it hath with another Right; this explained.

W

He may make War, and for what Causes, we have seen: It follows that we enquire what in War may be lawful, how far forth, and by what means we may prosecute it: which we are to inspect either simply, or in reference to some antecedent promise or agreement. Simply in itself, and that first, according to what is justifiable by the Law of Nature, and then accord.
What in War is lawful.

BOOK III.

II. Things necessary to the Lawful End, lawful in War. 

See second Book, Chap. 2. § 10.

III. A Right in War may arise from some frequent Cause in its prosecution.

IV. Some things may be gained without injury, indirectly, which purposely was not lawful.

Matthew 13:29.

ing to what is agreeable to the Law of Nations. And in the first place, let us see what is lawful by the Law of Nature.

First then, as we have often said before, in Morals, those things that conduct to the End, do receive their true intrinsic value from the End; wherefore whatsoever is necessary to the End, that is to receive or recover his own Right, (taking the word Necessary not physically but morally,) that we are underlied to have a Right unto. A Right, I say, strictly so called, as namely, it signifies a Power or Faculty of doing in the sole respect of Society: wherefore if I cannot otherwise preserve my life, it is lawful for me by what force foever to repel him that would take it away, though haply he that attempts it be without fault. Because this Right of defending mine own life doth not properly arise from another mans sin, but from the Right that Nature hath granted unto me to defend my self: whereby also I am empowered to take away from another that whereby my life will otherwise be certainly endangered, without any respect at all had to his sin; and to pollute my self of it, not as its right owner, for this is not indulged unto me for that end, but to keep it as long as is necessary for mine own security. So by the Law of Nature, I have a Right to take away from another that which he hath formerly taken from me, or if that cannot easily be done, yet to take that which is equivalent unto it; as also for the recovery of my just debt: and from hence will also ensue Propriety or Dominion, because that breach that is made in Equality, cannot otherwise be repaired. So where a punishment is justly due, there all manner of Force and Violence is Lawful and Just, if that punishment cannot be had without it: And so whatsoever is a part of that punishment, as the destruction of Corn, Cattel, the firing of Hounes, Towns, Cities, and the like, are also Just, so long as they exceed not in measure, but keep proportion with the offence.

Secondly, we must know, that what is our Right is not to be adjudged by the first cause of the War only, but from other emergent causes which arise in the prosecution of it; so we have seen in our Courts of Justice, after a Cause hath been well argued, a new Right hath often arose to a Party which was not before thought on. Thus they that shali associate with him that invades me, be they either Associates, or Subjects, do give me a Right to defend my self against them. So also they that shall join themselves with others in a War that is unjust, especially if they may or ought to know it to be so, do oblige themselves to repair the damage, and to pay the charges of the War, because they have caused it by their own default. So likewise they that rashly thrust themselves into a War undertaken without any probable Reason, deserve to be punished according to the injustice of their actions: For so long doth Plato approve of the War, Donee bi qui fontes funct cognitionis infinitum male affectet, penas dare; Until the guilty party be compelled to give satisfaction to those who being innocent, have been injured by them.

We must observe also in the third place, that whatsoever we execute the Right that Nature gives us, either to defend our selves, or to recover our own, many things do indirectly and beyond our purpose accrue unto us, whereunto we could otherwise have No Right at all. How this Rule holds in cases of our own necessary defence we have elsewhere shewn. So in the recovery of what is our own, if we cannot get just as much as was ours, we may take more, but on condition that we reforfe the surpluffage to the Right Owner. So a Ship wherein there are many Pyrats, or an Houte wherein are many Thieves, may be battered down or funk, though it be to the endangering of many Infants, Women, and such like innocent persons that were accidentally mixt amongst them. But this must ever be observed, that Non semper omni ex parte licetum est, quod juris, stricti juris, congruit; We are not always to extend our Right to its extremity, for not every thing that is strictly due, is always and altogether lawful. For sometimes our commision towards the Innocent, and our Charity towards our Neighbours, will not suffer us to exercise our full Right: wherefore in such cases we ought to be circumspect, and as much as in us lies) to foresee, and to avoid all such contingencies, which may fall out beyond that, which we principally aim at, unless the Good that we aim at be far greater than the Evil that we fear; or unless where the Good and Evil being equal, our hopes of obtaining the Good be greater, than our fears of the Evil can be, whereof prudence is the best Judge; yet so, that whensoever the cause shall happen to be doubtful, we always incline to that part which provideth rather for another safety than our own, as being much the safer, and if an error, yet it falls on the right hand. Let the taxes grow up with the wheat, (faith our best Matter) left while ye pluck up them, ye pull up the wheat also. Multos occidere & indigenter incendii & ruina potentiae cft; To destroy whole multitudes, faith Seneca, without distinction, argues a power proper to the sudden irruption of fire, or the fall of some great building, rather than the rage of a man. And how much sorrow and penitence such a rath act colt the Emperor Theodosius, upon the admonition of 5th Ambrose, Hiliores will inform us. And although Almighty God doth so sometimes, yet ought that to be no example to us, because of that full and abolute Right of Dominion that he hath over us, which he hath not granted unto us to have
one over another; and yet, even God himself, who is Lord Paramount over all Mankind, doth often spare a World of wicked and ungodly men for a very few that are good, thereby manifesting his equity, as he is a Judge; as sufficiently appears by that sweet Colloquy between him and Abraham concerning Sodom; by which general rules, it is easily collected, how far our Right extends in War against our Enemies by the Law of Nature.

And here another Question is usually started, namely, what we may lawfully do to those who are not Enemies, or at least will not be so reputed, and yet do daily supply our Enemies with such things as they need: Great contetts have antiently been, and now are about this matter; some fitly maintaining the rigour of the War, others asearnestly contending for the liberty of Trade and Traffick. But hift we must distinguish of the things wherewith the Enemy is supplied; for some things there are that of no ufe but in War, as Arms and Ammunition; some things there are which of no ufe at all in War, as things serving for pleasure only: And lastly, some things there are that are useful both in Peace and War; as money, Victuals, Apparel, Ships, and materials for Shipping. (At Athens it was prohibited to export Flax, Bottles, Timber, Wax, Pitch, and the like;) Concerning things not useful but in War, it is true what Amalof晋江 told the Emperor Justinian, He is to be esteemed as an Enemy, that supplies the Enemy with things necessary for War: as to the second fort of things there is no just cause of complaint. So Seneca thought, The favours of a Tyrant I may purchase, in case that which I give him, do neither increase his power to do mischief, nor confirm that which he already hath; for such things as these a man may give without encroaching the common cala-

Gen. 18. 29.

V.

What we may do in such cases as these, we shall consider hereafter, if God will permit us to treat of that. But now we would advert you, that this is a great Privilege which God hath bestowed upon the Church of England, making her to be a可以用AnswerS for the world, and that a City of God, as he himself hath declared. For he is a Judge, and as such he doth not only preserve the rights of those who are his own Children, but also the rights of them who are not his Family; as we have shewed you in the Book of Judges, where they were permitted to judge of the cases which did happen among them, while they were subject to the Judges of God. And this we shall speak of more at large in our Book of Pol. civ. And therefore we must not forget to advert you, that in all foreign Wars, and in all Wars of the Church, we must make it our Business to do that which is the most probable, that by this means we may receive ease from the Great God, and that he may establish our Kingdom, and make it to flourish, and to grow up to the attainment of all his promises. For he is a God of Peace, and a God of War, and he will be pleased to give us all the means which he can to advance our Kingdom, and to maintain our Religion. And therefore we must be careful to observe his commands, and to do all that is meet for our preservation, and for the advancement of his Kingdom. And therefore we must be careful to observe his commands, and to do all that is meet for our preservation, and for the advancement of his Kingdom. And therefore we must be careful to observe his commands, and to do all that is meet for our preservation, and for the advancement of his Kingdom.
upon the Baltic Sea, and the River Elbe, it was in Holland adjudged in full Senate, that the Goods found in an Enemies Ship, if it did appear that they belonged to others, were no lawful prize, and this was there from thence established for a Law; and so pleaded by the Danish King in the year 1597, who thereupon sent his Embassadors into Holland to afford his Freedom to transport his Goods into Spain, notwithstanding the bloody War which the Hollanders had then had with the Spanish. The like hath always been permitted by the French to any Nation that were at Peace with them, and that so freely, that oftentimes the Enemies have in other mens names transported their Goods without damage; as appears by an Edict made 1543. Chapter the 42. and by another made 1549, wherein it is provided, that their Friends might freely traffick whither they pleased, so as it were with their own Ships, Men and Goods, and that those Goods were not Belli Infrumenta, Arms, nor Ammunition for War, whereby their Enemies might be made stronger. But in case they did so, then it might be lawful to seize them to their own use, paying a valuable price for them. Wherein two things are observable, first, That by the Law, Ammunition for War was not held as lawful prize, much less were other innocent Merchandizes obnoxious to this danger. I cannot deny but that these Northern Nations have sometimes usurped another Right, but not confoundly, being urged thereunto rather by present necessity, then by a perpetual equity. The English upon pretense of their War would not permit the Dutch Freedom of Traffick, whereas arose that War between those two Nations, whereby the English were compelled to pay a Tribute to the Dutch, which was called the Dutch penny, which though the Cape were changed, yet the name of it continued till the Reign of William the Conquerour, as Touchans records it in the year 1589. Again, we find it recorded as well by Rubanus in his History of Holland in the year 1575, as by Master Camden in his History of Queen Elizabeth in the year following, that most wise Queen sent her Embassadors, St William Winter and Secretary Beale to Remonstrate, That the English could not endure that the Hollanders in the heat of their War then with Spain should detain their Ships trading in the Spanish Ports. And when the English and the Hollanders being both at War with Spain, did disturb the Cities of Germany in their traffick with the Spanish, with what a disputable Right they did it, appears by the eager disputation of both Nations, which are worthy our perusal for the deciding of this Controversie. And it is observable, that the English themselves do in their writings acknowledge no less, whereas they principally infilt upon these two Arguments to defend their Caufe; namely, that the Germans did furnish the Spaniards with Infruments of War: and secondly, that it had been mutually agreed in Ancient Treaties between both Nations, That it should not be lawful for them so to do. The like agreement we find afterwards made between the Hollanders and their Alliados, and the Luttekers and theirs, in the year 1593. That neither the one nor the other should permit the Subjectts of their Enemies to traffick within their Dominions, or should aid them with either Money, Ships or Victuals. And afterwards, namely, in the year 1617. It was agreed between the Kings of Denmark and Sweden, That the Dane should obstruct all manner of Traffick with the City of Danzieck, being then at Enemy with the Swedes, and not only so, but that they should not suffer any Merchandizes to pass through the Sound, or the Baltic Sea to any of the Swedes Enemies; for which the King of Denmark was to receive other Priviledges and advantages from the King of Sweden. But these are particular Contracts, from whence no general Rule can be inferred. Neither did the Cities of Germany only blame the English for denying them freedom of Traffick with their Enemies; But the Hollanders also complained against them in the year 1597, as Camden relates, That the Law of Nations was violated, because they were molested in their Commerce with Spain, because at that time the Spaniards had War with England: But the French having made Peace with Spain, being solicited by Queen Elizabeth, who was Rall at Enemy with the Spaniards that it might be lawful for the English to search their Ships for Arms and Ammunition, would not admit so much as this, alleging that it was but a pretence for rapine, and to disturb traffick. So in the League that the English made with the Hollanders and their Associates, it was agreed, That other Nations whom it concern'd to give check to the swelling Power of the Spanish Monarchy, should be solicited to forbid all Commerce with Spain, which if they did not voluntarily, then that they would permit their Ships to be searched, that no Arms or Infruments for War might be thither import ; but beyond this, neither were the Goods or Ships detained, nor any hurt done under that pretence to such as traffick'd peaceably. Nay, when in the same year several Hammerburghs were taken laden mostly with Infruments of War, those only were challenged by the English as prize, but for the rest of the Commodities they paid the just value. But the French when their Ships were seiz'd and confiscate by the English, because bound for Spain, did declare unto Queen Elizabeth that they would not suffer it. It is fit therefore, as I have said, That there should be Remonstrances and publikk Declarations, forbidding Traffick with our Enemies, before we seize their Goods as Prize. So Queen Elizabeth.
Elizabeth in favour to the King of France, against the Spaniard and those of the Holy League, sent out her Proclamation commanding that no man should carry Victuals or Provisions for War out of England, into any of the Ports of France possessed by the Leaguers, or traffic with them upon pain of High Treason. And afterwards the War waxing hot, it was publickly commanded upon the like pain, That no man should carry Corn, Munition, or Provision for Shipping into Spain, because he professed himself an Enemy to England, and refused to confirm the Ancient League between their predecessors. Neither is it necessary, that any Nation should be restrained from their freedom of Traffick by such D. clarations; but it is left to every Nation choice to do so upon their own occasions and advantages shall prompt them to, there being nothing found in Histories, that may probably infer any certain determination of this controversie amongst Nations; whereof such Declarations published though, have been sometimes observed, and sometimes not, accordingly as it stood with the respective advantages of several Nations. And for this Caufe we refer the decision of this Querion to the Law of Nature. When the Handtowns made sore complaints against Queen Elizabeth, upon Her taking of Sixty Hulks Trafficking to Spain, then in open War with England, as if their Ancient Privileges had been broken. She answered, That she had forewarned them, that they should not carry any provision for War to the Enemies of the Realm of England; and that carrying them she had lawfully taken them, and could do no other unless she would wilfully draw destruction upon her self and People; Their Privileges were but Private Laws, which are not to be maintained against the Publick Safety, which is the highest Law; and this the afferts to be the Law of Nations. The Carthaginians we read sometime took the Romans Prisoners, who had carried such Warlike Provisions to their Enemies, yet upon demand they let them go; But Decretals being poel of Aristotle, and having strictly before Athens both by Sea and Land, taking a Ship that was attempting to return (being many ready to yield) hanged the Master of the Ship together with the Pylor, whereby others being deterred from the like attempt, the City was yielded up to him, as Plutarch relates in the life of Demosthenes. Not much unlike unto this, was that which the same Plutarch in his Mithridatick War testifies of Pompey, That he placed Guard upon the Bosphony, us, so that if any Romans were found through it, they were to be slain, upon his decret of sailing upon the Bosphorus, the Romans swearing not to attempt the like, so it was done. And as to the manner of prosecuting War, it is generally granted, that Force and Terror are the most powerful ways: The Querion is, Whether deceit be lawful. Both Homer and Pindar were of opinion, that an Enemy might be annoyed any way, by Fraud or Force, plainly or secretly, clamores palamoves: So Vergil, Force or Deceit who in a Free dispute.

No man was more famous for wisdom than Solon, yet he made use of both. So did Fabricius, Maximus, and is highly commended for it by Suidas. For stratagems of War, none so celebrated as Thyes amongst the Grecians; from whence Lucian makes this conclusion, that Deceit in War is a use-worthy. There is nothing in War as Fraud, faith Xenophon. Braccidas in Thucydides gives the greatest Honour unto him that overcomes his Enemy by craft and subtlety. If the enemy is taken alive, or cast into their hands, he shall be oblig’d to deliver them, to over-come that Enemy, faith Aesopius in Plutarch, is both just and lawful. So Polybius, He that can circumvent his Enemy, by wills and stratagems, deserves more Honour than he that overcomes him by plain force. And from him Suidas brings in Corvinus speaking thus,

Bellandum est astra, leviorlaus in Duce dextra.

'Tis fraud, not force, commands a Captain most.

So also thought the severre Spartans, as Plutarch notes in the life of Marcellus; and therefore they offered more solemn Sacrifices to the Gods, for a Victory obtained by craft and policy, than for that which was gained by mere force. And herein it was that the same Plutarch commends Lyssander because he used more craft than courage in destroying his Enemies; with whom he compares Sulla, of whom this Character was given, That he pleased to the Lyons ship the Fexes tail. So likewise in that Encomium which he gives of Philopamment, he infers this, That being well instructed in the Cretenan Discipline, he did explicate that plain and generous way of fighting by wiles and stratagems. Thus Amonianus also, Nullo deferentior virtutis ac debo, prosperi onmis laudari debent bellorum eventus, Without any distinction at all between craft or courage, all prosperous success in War defend commendation. The Roman Lawyers accounted all fraud, whereby an Enemy was weakened, to be just and honest: And if a man could by any means delude the designs of his Enemy, whether it were by force or wit, he was to be encouraged. Neither amongst Divines doth St.Augustine differ in opinion from these Historians, as appears by his tenth Quotation on Joanny, Cum iufium bellam faciendi, vi aperta pugnet qui iniuriet, nihil ad justitiarn interire; In case the War be just, faith he, it matters not to the justice of its execution, whether it be by force or policy. Nay St.Chryst. postum
What in War is lawful.

BOOK III.

VII.
Fraud in its negative act not unlawful.

Di Offic. 3.

Lib. cont. Men-dact. cap. 10.

Gen. 20.

Jerem. 38.

VIII.
Fraud in its positive acts distinguished.

Pliny ill. 6.
cap. 50.

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Joseph seems to give greater honour to those Generals that overcame their Enemies by fubility, than to those who conquered them by pure valour. But there are opinions that seem to defend the contrary, some whereof we shall rehearse anon. The main hinge whereupon the Controversie hangs, is this, Whether deceit be universally Evil, for then it will follow, that we are not to do Evil that Good may come of it, or, Whether Deceit be to be ranked among such things as are not universally Evil in their own Nature, but that sometimes it may so happen that it may be Good.

Here therefore we are to observe, That some fraud consists in a negative act, and some in a positive. But in this question, I extend the word Fraud even unto those things which consist in the negative act, as Luke 32, who refer'd it unto that fraud which is not Evil, when a man by dissimulation preserves that which is either his own, or another man's. Cicero doubtless was very short in his expreffion, when he laboured to explode simulation and dissimulation of the world: For seeing we are not bound to reveal unto others, all that we either know, or would have; it will follow, That it is lawful for us to dissimulate some things before some men, that is, to hide from them somewhat of what we know, or of what we delire. Lictor occultare veritatem prudenter sub aliqua dissimulatione; The truth we may sometimes prudently conceal under some disguise, faith St. Augustine, which we may do without being unjustly charged with lying: For as the same Author elsewhere speaks, 'Aliud est mentri, aliud verum occultare; It is one thing to lie, and another to conceal the truth.' As Abraham when he affirmed Sarah to be his Sifer, did not therein deny that she was his Wife, but only concealed it. So St. Augustine, Veritatem velit celari, non mendacium dicii; He was indeed willing that the truth should be undiscovered, without telling a lie. Now if this be lawful in others, surely it is necessary and unavoidable in Princes, as Cicero testifies in many places. A notable example whereof we have in the Prophet Jeremihmb, where the Prophet being enquired of concerning the event of the siege, did in the Kings requent prudently conceal it from the Nobles, alledgeing some other cause of their Conference, which notwithstanding was really true also. So Abraham told Abimelech true, when he said of Sarah that she was his Sifer, that is, according to the custom of that Speech among the Hebrews, his near Kindwoman, dissimbling for that time, that she was his Wife.

But fraud which consists in a positive act, if in things, is called simulation; if in words, a lye. Some place the difference between these two in this, That words do naturally signify the conceptions of our minds, but things not so: But on the contrary, words, of their own nature, and set aside from that senfe which men have agreed to give them, signify nothing, unless it be such an inarticulate and confused noise as pain and grief causes us to make, which is more underfoot by the thing we suffer, than by the noise we utter. And if it be objected, that it is peculiar to the Nature of Man, above all other Creatures, that he is able to express the manifold conceptions of his mind unto others, to which end words and voices were invented, we do not deny it: Yet this also may be added, That such indications are not made by words only, but by beckes, nods, and other signs made by the eyes, head or hand, as among such as are born dumb. (Thus Piny testifies of the Ethiopians, Quibusdam pro fermo, nutus, motusque membrorum ef? That some of them instead of words, express their minds by various motions of their other members.) Whether those beckes, or other motions have naturally something common with the things signified, or whether they have a certain signification by agreement only. Cononant whereunto are those Egyptian Hieroglyphicks, which as Pausus the Lawyer faith, signify not words but things: for faith he, 'It is not the figures of the letters, but the speech express by those letters that do oblige us so far forth as it is agreed, that what is by any writing declared, shall be as binding, as what is express by word of mouth.' Where you must note, that the word Placeat is very emphatical, as shewing that that which gives such force and validity to words is consent and agreement. And here again we must have recourse unto that distinction, which we made use of to take away all ambiguity concerning this word, the Law of Nations. For we then said, that the Law of Nations signified, either that which was admitted of by every Nation without mutual obligation, or that which all Nations did mutually oblige themselves to observe. Now voices, nods, and such like indications of the mind, are admitted to signify things by mutual obligation, which Aristotle calls κατα ουσίαν, according to agreement; whereas the others are universally agreed on to signify such and such things, that all Nations are obliged to such and such, and which cannot be so generally underfoot of things. Whence it follows, that it is lawful for me to do or use other acts, or things, though I do forefee that another man will conceive a false opinion of them: I speak of that which is intrinffick, and not of that which is accidental. And therefore we must give an influence, first of such a case where in no detriment at all ensues; such was that of Michel when she deceived her Father, with an Image laid in stead of David. Thus our blessed Saviour seemed to his two Disciples, as if he would have travelled beyond Emanuel; and perhaps he intended so to do, unless they
What in War is lawful.

did importune him to abide with them, as God himself is said to will many things suppositively, which notwithstanding come not to pass, the condition being not fulfilled. And Christ himself made as though he would have passed by his Apostles as they were falling on the Sea, that is, unless they should earnestly desire him to come up into their Ship. Another example may be given in St. Paul, who doubtless when he circumcised Timothy, knew very well what construction the Jews would make of it, namely, That the Law of the Circumcision, though abolished by Christ, did still, even in the judgment of the Apostles, oblige the Children of Israel; whereas St. Paul, dispensing with this error, propoffeth to himself another end, namely, That through that mistake he and Timothy might gain the advantage of a more free and friendly conversation with them. For the Ceremonial Law being abolished, neither did circumcision, by its first institution, any longer signify a necessity of keeping that Law; neither was the evil of that error, which from thence arose, and for a while continued, (though afterwards to be exploded) so great as was that good which Paul and Timothy then aimed at, which was a more facile infusion of the Doctrine of the Gospel. The Greek Fathers do usually express this kind of simulation by the word εκνομισμα, signifying a dispensation. So Cyprian, This was no deceit nor hypocrisy, but a compliance or dispensation. And again, upon that of St. Paul, To the Jews I became a Jew, &c., he faith, That St. Paul, to the end he might convert those that were really superstitious, at first appeared unto them to be so too, making an outward show, as though he had been otherwise than what he was, he did such things as they did, but not with the same purpose and intention as they did. And this is his meaning when he faith, I became all things to all men, that I might save some. Hither also we may refer that personated madness of King David in the Court of Achish. There is a notable Saying extant of Clement Alexandrinus, who, describing the qualities of a good man, faith, That some things he will do for his Neighbours sake, which otherwise he would not do. Such was that act of the Romans, who when their City was beleaguered, threw great quantities of Bread from the Capitol into their Enemies Camp, (when in truth they had but little to spare) to the end that their enemies, desirous to take the City by famine, might give over the Siege. Another example of such a simulation wherein the hurt or detriment that follows (letting aside the fraud) is lawful, we have in that feigned flight of Josua before the Inhabitants of Aye, Jofh. 8. which is very frequently practised by other Generals. For such a feeming flight is, quasiter, lawful, as signifying nothing by consent or agreement, but according to the construction that the enemy will make of it, wherein, if they are deceived, they deceive themselves. And to this end also it is lawful for us to make use of our Enemies Armes, Colours, Garments, Sails, and the like, whereof we shall find in all Histories. For all these things every man hath liberty to make use of, though contrary to usual custom, at his own pleasure; because such very custome of using or wearing such or such a colour or fashion is in every mans particular choice, and is not appropriated to this or that Nation by common consent, and therefore obligeth none.

There is yet a more arduous Controversie concerning those notes or signs which men frequently use in their commerce one with another, of which the most proper and usual fraud is lying. Much may be found in Holy Writ against it, as Prov. 13. 5. A good man hateth lying. So Prov. 30. 8. Remove from me all falsehood and lies. So the Psalmist, Thou shalt destroy all those that speak lies, Pail. 5. 7. And it was the charge of the Apostle to the Olothians, Do not be one to another, Col. 3. 9. This opinion is very strenuously defended by St. Augustine, and with him agree many, both Poets and Philosophers. Very well known is that of Homer,

İlle mibi incufis pariter cum saucibus Orci,
Ouius mens aliud condid quam lingua prefatur.

Equal to Hell it self hateful be he,
Whose heart and tongue do always disagree.

And that of Sophocles,

Aliena vero prologue nonquam decet:
At vera certum si cum peflem ferant
Hinc danda venit eft, fi facit quod non decet

Utruth to speak is an indecent thing;
Yet if to any, truth swift ruine bring,
A lye to him is not imputed sin.

And that of Cleobulus,

Adinadanim est quisquis animitis sapit.

He that sincerely, wife doth lies degell.

Aristotle
Arifotle is on this point somewhat modal, Simply, faith he, and in it self, lying is vile and reproachful, but truth fair and commendable. But this, he faith, by it self considered, without any regard to circumstances. Yet doth not the contrary opinion want Advocates, and does of great authority. As first, In the Holy Scriptures, the examples of many good men, who though they did it upon very weighty occasions, are not yet not reproved upon record for it. Concerning which ireneus, being so instructed by a certain Old Priest, gives us this Caution, De quibus Scriptur ? non increment, sed simpliciter som pa$e, non non debemos fieri Accusatores : We ought not to be their Accusers, whose words or deeds the Scriptures do simply recite, but not blame. Secondly, The declared opinions of many ancient Christians, as Origen, Clemens, Tertullian, Lantantius, Chrysifones, Hieroc, Caifianus ; yea, and of almost all Christian Writers, as St. Augustine himself confesseth, herein only differing from them. That he acknowledgeth it to be a very knotty question, full of intricacy, and by the learned variously disputed; all which are his own words. Among Philosophers, the plain Assertions of this his opinion are Socrates, and his two Disciples Plato and Xenophan as also Cicero ; and if we give credit to Plutarch and Quintilian, the Stoics, who reckon this among the qualifications of a wise man, To know where and when it is lawful to lie. Neither doth Arifotle himself seem to differ from them in some places, witness that Clafic of his before-mentioned [καὶ οὐρ] of itself, that is, commonly the thing considered in itself, without respect to other circumstances. For as Andronicus Rosodus, giving an influence in a Physician lying unto his Patient, faith, He deceiveth indeed, but yet it is no Deceiver; and gives this reason for it, Because his purpose and intention is not to deceive his Patient, but to preserve him. And Quintilian before-mentioned, defending this opinion, faith, That there are many things which are said to be either honest or dishonest, not simply from the self, but from the Cause moving to that fault. So Diphilus,

If by a lye mens life prefers'd may be,
What harm may thence ensue I cannot see.

When Neoptolemus in Sophocles asked Ulyfles, Whether he were not ashamed to lie: Ulyfles readily answered,

No, if our safety do thereon depend.

The like testimonies may be produced out of Lisander and Euripides. So in Quintilian also I read, Nam & mendacium dicere, etiam sapienti aliquando concessum est ; For it is not disarrangement to a wise man sometimes to tell a lye. A wise man, faith Sibaribus upon Homer, may upon a great occasion tell a lye. And for confirmation of what he there faith, he producesthe testimonies both out of Herodotus and Iphocrates. There are some (faith Donatus upon Terence) that writing concerning the Duties of a good man, & ipsum fallere in tempor, rectum putant, do oftem at a point of honesty sometimes to deceive. And indeed that he would do some men good, cannot do it, unless he circumvent them ; wherefore Cicero in his Oration for Ligarius, approves of such a lye as honest and charitable.

These of different opinions may haply be in part reconciled by that common distinction of lies, taken in a stricter and in a larger sense. For we do not here take the word so largely as to comprehend all that falsehood which sometimes is spoken through impudence, as Gellius rightly distinguished between mentiri, & mendacium dicere ; To lye, and to speak that which is not truth. But we take it here as signifies an untruth, spoken knowingly, whereby we contradict the conceptions of our own minds, either in our understanding or our will. For whatsoever is first and immediately signified by either words or other notes, are the conceptions of our minds ; wherefore he doth not lye, who though he do speak that which is falle, yet conceives it (when he speaks it) to be true. But he that faith a thing is true, yet thinks it to be false, doth undoubtedly lye. For ream lingnum non facit nigrae mens; The tongue is not made guilty, but by a guilty mind. And as St. Augustine speaks, Quamnam in ipso est, non fallac, sed falso; He that speaks an untruth, but thinks it to be true, doth not deceive, but is deceived. And if so, then it will follow, That when any word or sentence will admit of devisesignifications, either by familiar use, or by the customs of art, or by any figurative expression that is intelligible ; then if our inward meaning agree with any of these significations, it is not to be esteemed as a lye, though he to whom we speak is believed to understand it in a different sense. Thus did Abraham commune with his Servants subtilly, when he bad them to tarry there while he and his Son Isaac went a little further to sacrifice, promising that when they would both return; which as then he intended not. But these captious and equivocal expressions are not rashly to be allowed; yet may they upon some occasions be justified : as in case we are thereby to instruct such as are committed to our charge, or to decline some pernicious questions whereby we may be infuriated. Of the former Christ gives us an example in himself, when he said, Our friend Lazarus sleepeth; which the Apostles understood of his taking rest in sleep. So when he
he told the Jews, That they would destroy the Temple, and in three days he would raise it up;

Which meant of his Body, but they of the material Temple. So again, when he promis'd his Apollos, That they should sit on twelve Thrones, judging the twelve Tribes of Israel; and that they should drink new wine with him in his Father's Kingdom: He knew very well that they understood him as of a temporal Kingdom, whereof they were full of hopes, even unto the very Day of his ascension. And thus in another place he speaks to the people in Parables, left hearing they should understand; that is, unless they should bring with them such reverence and attention as was requisite, in order to the right receiving of his pure Doctrine.

As to the latter use of these Amphibologies, amongst prophane Authors Tacitus will furnish us with the example of one Lucius Vitellius, who being urged by Narcissus to unridge himself, and to speak the truth plainly, could never prevail; but still he gave ambiguous and doubtful Answers, such as might incline them to that whereunto he would have them led. So the same Tacitus in another place, speaking of Tiberius, faith, Its com- pofitu, ut ex eventus rerum adversus abierent, vel propea agremae; He did so artificially com- pose his Answers, that expelling the event, he might either renounce the "Plot if it succeeded not, or own it if it prospered." There is a very no- table Saying among the Hebrew Doctors, Si quis norit uti perplexi- quos, rati; quin minus, recent; If a man being put to answer insidious questions, can either prevent or avoid them by Amphibologies, let him; if not, let him not answer at all. For as St Chrysostome Obferves, He is not to be reckoned as a Deceiver that useth Amphibologies to a good end, but he that useth them to a bad. But yet, in some Cases, to use them is not allowable, as namely, when either the honour of God, or our charity to our Neighbour, when our reverence to our Superiors, or the nature of the thing itself whereof we treat, requires that we should clearly unmask our selves, and declare the truth; then to use these Amphibologies is not only indecent, but impious. So in Contracts, we have already said, Whateuer the nature of the Contract requires to be underfooth, should be declared. So of Laws which should be the Guides of mens manners, it is required that they should be expreft in the plaineft and most significant words that may be found. Now in the Case of Contracts may that of Cecere be fitly un- derfooth, That lies ought to be excluded of all humane commerce; which he means to have borrowed out of that old Attick Law, sale. In a Market nothing ought to be spoken but truth. In which Cases the word mendacium is to be taken so largely as to comprehend all doubtfull and ambiguous Phrases, which we speaking properly have hither- to excluded from this Notion of lying.

It is required therefore to the nature of a lye, commonly fo taken, that what is either spoken or written, or by any other signs express, cannot otherwise be underfooth than in such a fence as is different from his mind that so declares it. But to a lye strictly taken, as it is naturally unlawful, there is necessearily required some peculiar difference, which it rightly underfooth, at least according to the common accepted Conception of Nations, can be no- thing more than the violation of his exifing and remaining right with whom we con- vero. For certain it is that in respect of himfelf no man can lye, let him speak never fo much falsehood. Where by Right, I understand not every Right, and what is extrinfick to the thing; but that which merely relates unto the matter in hand, which is nothing else but his freedom with whom we difcourfe, to judge at the conceptions of our minds, which as by a silent Contract, we are presumed to owe unto him. For this, and no other, is that mutual obligation which men were willing to introduce fo soon as language was invented, or those other notes or signs generally received as significant of our inward thoughts, without which obligation that invention had been altogether fruitles.

(And therefore amongst the Hebrews, is that depraved a man of the means of knowledge, was faid for furari, to steal away his heart, as Jewes is faid to steal away the heart of Laban, in that he did not acquaint him with his purpose to depart from him, Gen. 31. 20, 26, 27. Now it is also requisite that this right or liberty to judge by such words or signs at their inward conceptions, should remain intire at that time when we difcourfe. For possible it is that though there was such a freedome, yet it is then taken away, or may be by some other right that is supervenient. As a Debt that was, may cease to be so, by reason either of an Acquittance given, or a failing of the performance of some Condition. Again, it is required, That the right that is violated be his with whom we difcourfe, and not a By- standers, or any other mens. As in a Contract there arifeth no injustice, but by the violation of the right of one of the Contractors. Hence haply it is that after Simonides, Plato refers the speaking of truth to juifice. And that St Augustine himself infers into the definition of a lye, That it be spoken animo fallacis, with a purpose to deceive. And Cecere, Plato, and o- others would have the speaking of truth to be referred to the fundamentals of Juifice, and that that lying that is forbidden, the Scriptures do often describe by bearing fallac-
What in War is lawful.  

**BOOK III.**

**XII.**
It is lawful to speak untruth to Infants and Mad-men.

**XIII.**
When he to whom we directly speak is not deceived, but a By-flder.

*De Enfl. 7. c. 23.*

Hyperbole, Ironies.

*See Aristotle, Cont. 13. 10. 5.*

*Livy 1. 24.*

*App. Hypp.*

**XIV.**
When our speech is directed to him that is willing to be deceived.

*Call. c. 1. e. 1. 2. Mil. 4. Plut.*

witnesses against our Neighbour; whereunto Latinius hath respect where he faith, *That no untruth ought to be spoken at any time with an intent either to hurt or deceive our Neighbour.* But this right may be taken away (as I have said) as by express consent of him with whom we converse, when he declares before he speaks that he will speak falsely; and he to whom he declares it, doth permit it: So by a tacite consent, or on a preemption grounded upon just reason, or by the opposition of another right, which by the common judgment of all is most prevalent. From these premises rightly understood, many inferences may be drawn, in order to the reconciling of those different opinions formerly mentioned.

As first, In case we converse with either a Child or a Madman, if what we say be false, it cannot be imputed as a lye; because (as Quintilian faith) it is universally permitted, as profitable, to instruct Infants by Tales and Fables. But the immediate reason is, Because not having a freedom of judgment, they cannot be injured about that liberty which they have not.

Secondly, Whilst we discourse with one man who is not deceived, if another to whom we direct not our discourse be thereby deceived, we cannot be justly charged with a lye. For first, it is not a lye, in respect of him to whom it was spoken; because his judgment remains found and uncorrupted, as his doth who hearing a Romance, understands it to be so. So likewise doth he, who hearing a Parable or figurative speech, whether it be by way of Irony or Hyperbole, whereby we arrive, as Seneca speaks, at the knowledge of what is true by something that is not true, affecting things incredible to gain belief to things credible. Neither is it a lye in respect of him that overhears it; because he being not concerned in our discourse, we fland no ways obliged unto him: but if that man do conceive an erroneous opinion by reason of a discourse between others, he may justly blame himself if he be deceived, and not others. For to speak properly, Our speech one another is no speech at all in respect of a By-flder, neither doth it signify to him any thing. And therefore neither was Cato the Censor to be blamed for promising aids to his Confederates, though falsely, nor Flaccus in divulging unto others, That Eumenes had taken his Enemies City by assault, though it were untrue, and his enemies thereby deceived. The like Phlistarch records of Agesilau. For nothing was therein said to the Enemy; and therefore the damage that was consequent thereunto was but extrinsic and adventitious, which to an enemy either to wish or procure was not unlawful. Unto this kind of false speaking St. Chrysostome, Hierome, Cyril, and others, refer that speech of St. Paul, reproving St. Peter at Antioch for too much Judaising, as believing that St. Peter very well understood St. Paul, namely, That he did it not seriously, and in good earnest; but only to prevent a scandal that might thence arise to such as were weak amongst them.

The third Instance is this, When we are sure that he with whom we converse will not only not be offended, though his judgment be for the present dulled, but that he will also be thankful in regard of the profit that will thence arise to him. In this case a lye strictly taken, that is, an injurious lye, cannot be imputed unto us, no more than that can be imputed unto us as theft, when upon presumption that the Owner will not be offended, we find for what that is his, thereby to procure him a much greater profit. For in cases of such certainty of profit, our presumptions are as authoritative as his express consent. And to him that is willing, is no injury done. Wherefore a Physician is not prejuled to lye, when he cheers up his dying Patient with the feigned hopes of recovery. Or when a General in a dangerous Battle cheers up the Spirits of his fainting Souldiers, with some comfortable news, though false, whereby he procures both their safety and victory. We are altogether to speak truth (as faith DEMOCRITUS) where it is hazardous: yet, as Xenophon observeth, Deceive we may ease our very friends, when it redounds to their good. The Physician (as MAXIMUS TYRISIUS) deceives his Patients, the General his Souldiers, and the Pilot his Mariners; yet neither of these should be said to injure them: wherein Proclus in Plato gives this reason, Because that which is good is to be preferred before that which is true. Histories are full of examples of this nature, as that in Xenophon, When to encourage his Souldiers, he caused it to be given out, That an Army of their Confederates were coming to affift them. And that of Agesilau in Plutarch, when he came into Boeotia, and there understood that Pylander, was there overcome by a Naval Battle by Pharnabazus and Conon, caused the quite contrary to be published to the Army, which to confirm he came crowned into the Temple, causing solemn Sacrifices to be offered to the Gods for the Victory. And (as Masurio mentions, as Historians call it) that whole lye of the Confu Quinquibus, who to encouragethem Right Wing, gave it out, That the Left Wing had routed their Enemies. This is that of CLEMENS ALEXANDRinus to be understood, who allows of a lye as the utmost refuge in the time of danger. Where we must observe, That the injury that is done unto the judgment in this kind, is so much the les as it is momentary; whereas the good that may ensue is great, general and laffing: for the victory being gained, the truth immediately appears.
The Fourth, and that which comes nearest unto the former is this; so often as he, who hath a supereminent Right over all the Rights of another, makes use of that Right, either for his own particular interest, or the publick good. And hereunto had _Plato*_ respect, when he indulged unto Princes that liberty to speak untruths. And yet the same _Plato_ when he seems sometimes to grant, and sometimes to take away this licence to, or from Physicians, seems to put this only difference that in giving it, he intends it to such as are publicly Authorized unto that calling; and in taking it away, he intended it from such as over arrogantly affirmed it unto themselves. And yet neither did _Plato_ himself think it fit to admit of lying in God, notwithstanding that Sovereign Power that he hath over men; because it is an argument of much weakness and insufficiency, to have recourse to such shifts (which to attribute to God were Blasphemy.) An example of this innocent and unblamable falsehood we have in _Joseph_ to his brethren, for which _Philo_ so highly commends him, who as the Kings Vicegerent, doth with a becoming severity charge his brethren contrary to his knowledge; first, for being Spies, and afterwards, for being Thieves. Another we have in _Solomon_, who to discover the true Mother, commanded the Child to be divided, when he intended nothing left. So true is that of _Quintilian_, _Aliquando exspecti comminatus ut, eam satis defendam_; _It is sometimes expedient for the common good, that some falsehoods should be maintained._

We may add a fifth, namely, when the life of an innocent person, or some such like, cannot otherwise be preserved; or when the execution of some dishonest act cannot otherwise be prevented; such was the fact of _Hypermnestra_ so much celebrated by _Horace_,

_Splendide mendax, & in amne virgo_

_Nobilis exsum._

Defersing for her pious fraud
Immortal praise.

Whereupon the Schoiabiat hath this note, _Decenter: Pulchrum est enim pro justitia mentiri; very decently: for to be sometimes for justice and innocency is a lovely thing. There are faith_ _St. Aug._ two sorts of lies not much to be blamed, though they are not altogether without blame; and these are either the _jocular_, or the charitable; _The jocular is not pervious, because it deceives no man; for he to whom it is spoken, knows, that what it is spoken is but in sport. The_ _charitable by is so much the less dangerous, because it proceeds from charity_. And therefore _Tertullian_ amongst those daily fins of infirmity, whereinunto we are subject, deprecates this, _When in cases of danger we make by our subterfuge_. _St. Chrysostome_, doth not only excuse Rahab's lie, but commends it, _O pulchrum mendacium! O laudabilem dolum, &c. O lovely lie! O commendable fraud, faith he, of one that betrayed not things Divine, but to preserve true Piety, So, likewise, doth St. _Augustine_ of the Egyptian Midwives, _O magnus humanitatis ingenium! O pulmo pro salute mendacium! O rare device of humanity, O pious lie framed only to preserve life! For which St. _Hierome_ doth not only commend them, but believes that God also did reward them, even with eternal blessedness, as will appear to any that reads his exposition on the 17. of _Ezech_, and on the 56. of _Ezey._

_Some wise men are of opinion, that to an Enemy we may use falsehood in a larger sense, as Plato and Xenophon among the Grecians, Philo among the Hebrews, and amongst Christians St. Chrysostome; who to the rules they give for not lying, add this exception, Unles it be to our Enemies. If we call to the left the brave exploits of our noblest Captains, faith St. Chrysostome, we shall find that they owe most of their triumphs to fraud, and that these Victories so gained, were always more renowned, than those gained by plain force. And hitherto to haply we may refer that Meleagre that the men of _Joseph_ Gilead, fell unto the Ammonites, by whom they were believed, 1 Sam. 11. 10. And that of _Elifba_ the Prophet, when he told those that were sent to apprehend him, from the King of Syria, _That that was not the way, nor the City where Elifba wast_, 2 Kings 6. 10. As also that of the fame _Elifba to Hazael concerning Benhadad_, 22. _Go and dye to him, thou mayest certainly recover, beweit the Lord hath heaven me that he shall surely dye_, 2 Kings 8. 10. As also that of _Valerius Levienius_, when he boasted that he had slain Pyrrhus. To the third, fourth, and fifth of these inferences above mentioned, we may refer that of _Euphrasius_, _It is not always necessary that he that gives good advice should speak true; for, haply he that rightly adviceth, may advise purposely how he may frame a lie, so that thereby, either his Enemy may be deluded, or his friends previledged_. Examples of these kinds are very frequent in all Histories. To the same purpose is that of _Quintilian_, _If a Thief enquiring after a Traveller, with an intent to kill him, may be misguided; or if an Enemy for the preservation of our Country, may lawfully be deluded: then that which in a servant is reprovable, is in a wife man commendable_. The Schoolmen of this latter age will not I know admit of this, who out of all the Ancient Fathers, have chosen

**Vid. Dra. M. _Metam. Ethic._
_Helast. Aug._
_Lib. 2. 2. qu_ _et Exord._

**XVII. Lawful to Enemies._

*Lib. 2. de rep.*

1. 2. de _Or. Infl._ & _5. So- 

*St. Aug._ is very doubtful in this case.

2 _Kings 6. 19._

2 _Kings 8. 10._

2 _Kings 6. 10._

3 _Qu. 6. Nic_.
The Schoolmen make St. Aug. the guide.

What in War is lawful. BOOK III.

sten St. Aug. only as their guide in almost all things. But yet as scrupulous as they are and nice, in admitting of false speaking in any case, they notwithstanding, make no scruple of admitting facetious interpretations, and mental reservations, which are wholly to be rejected; intomuch, that it is hard to determine, whether it be not better to admit of speaking falsely to some persons, and in some cases (as those before mentioned) than so indifferently to distinguish between falsity, and those secret interpretations, and silent reservations, whereof they approve; which being admitted, no man can possibly know, when his Neighbour speaks truth. and when not: As when to a Question that is asked me, I answer, I know not, I mean, I know not so as to tell you that I know it; or when I say to a poor man, I have nothing, I mean, I have nothing to give you, &c. which interpretations, even common scence is shamed to own; and which being admitted, will easily introduce plain contrarieties: so that he that affirms anything, may be understood to deny it; and he that denies anything may be said to affirm it. For it is most true what Chrysippus in Gellius maintains, That there is scarce any voice that admits not of some ambiguity, because every word besides the signification, which is of its prime institution, hath also another of the second, and that divers according to the diversity of arts, yea, and others also, which it borrows from translations and from semblable figures. Besides as Seneca observeth, There are infinite things without names; which we are forced to describe, by such names as we borrow from other things. Neither do I better approve of those, who as if they quarrelled more with the word, than the thing, call that jett or sport, which they utter, with a countenance and pronunciation very serious.

We are likewise to observe, that what we have here set down concerning false speaking, is to be referred to that kind of speech which is afeorthy, and that also so far forth only as it damifies none, unless it be a public Enemy, but not at all to that which is profamory; for every promise confers a new and special Right to him, to whom that promise is made: And this is in force, even amongst Enemies, notwithstanding the greatest and most open hostility, and that, not only where the promise is expressed; but where it is presumed, in the founding of a party, whereof more anon, when we come to treat of publick Faith, which is to be prefervd even amongst Enemies, between these two kind of speeches, I mean afeorthy, and profamory. Aeschines in Plutarch clearly distinguishes, where he faith, Fadcrs violare, Deos est contemmarc; extra ea verbq hostem deciperi, non juftum modo ef, sed & gloriam habet & cum lucro voluptatem: To violate Leagues, is to despatch the Gods: But otherwise to deceive an Enemy, which words are not only just, but glorious, and with delight profitable.

Neither is it to be extended to oaths, either afeorthy or profamory; for oaths have a power to exclude all exceptions, because therein we have to do not with men only, but with God, to whom by our oaths we stand obliged, although there arise no Right at all to men: for (as I have already said) it is not so in those speeches which are confirmed by oath, as it is in others; for in others it is sufficient to justify us from lying, if the words spoken be true in any fene, not altogether unusual; but in that which is Iwor, it is necessary that our words be plain and significant, and fitted to that fene, wherein he to whom we swear, is thought most probably to understand them, when we may discover the detestable impiety of thofe, who affirm that it is as lawful to deceive men with oaths, as Children with dice and other toys.

We know, that there are some kinds of fraud, which though naturally permitted, yet are not by some people and some persons decry'd; nor so much for any thing in them that is unjust, as out of either magnanimity of spirit, or sometimes out of a premeditation on our own strength. There is in Ebian an excellent saying recorded of Pythagoras, namely, That there are two things wherein men draw near unto God, in speaking truth always, and in doing good unto all men. For truth (as Jamblicius speaks) is the Captain or Guide to all vertues to Whom Moral or Divine. And Aristotle gives it as the truest Character of a magnanimous perfon, that he loves truth, and to speak his mind freely. Whereas on the contrary, It is, as Plutarch notes, the badge of a vile and servile spirit to lie. And therefore (as Arrius speaks of King Itolemy) It is worse in a King to lie than in any other. So the same Author speaks of Alexander, Nothing so well becomes a Prince, speaking to his Subjects, as truth. And Amarynt the speaking of the Emperour Julian, faith, Admirable is the concord that there is between our princes tongue and his heart, as knowing, that lying argues a base and abject spirit; and whereas it is fear and poverty only, that makes men liars, he is ignorant of his own Majesty, who being a Prince disdains not to lie. It was Plutarchi observation of Aristides, That he was so great an admirer of truth, that he would not tell a lie, though but for sport. And as for such as are fallacious and deceitful, we usually account them (faith Philo) as base and fords; truth therefore ought much more religiously to be observed by us Christians, by how much we are enjoined to be simple and innocent, and forbidden, not only falsehood and wrongfull dealing,
dealing, but all idle talk and vain babbling; yea, and since we have him for our Copy to write after, in whose mouth was found no guile. Wherefore as Latinam faith, That man that is truly born, will not fray with Lucilius, Homini amico ac familiaris non est mentiri mens; Where with my friend I talk, I do not lie: But rather will think it his duty not to lie, though he have to do with a stranger or an Enemy, and at no time to do that thing, that may occasion his tongue to speak what his heart thinks not. Such as Sophocles testifies, was Neoptolemus the Son of Achilles, who being urged by Ulysses, to piece the Foxes tail to the Lyons skin, made this anfwer:

_Ego audientes qua doleo, Latra fate, _
Implere fatalis oderim multo magis:_
Nam sic nec ego sumnatus, ut fallacias _
Setter, nec obiin genitor, at perribens mens:_
At sum parasuov merc, non fraudibus _
Perit abire raptum._

So likewise Horace concerning his Father Achilles,

_Ille non inculsus ego Minerva _
Sacra mentis, male feritas _
Trosa etiam Priami chartes _
Fallerat alius:_
_Sed palam capiti gravit, &c._

Whereby he intimates, That Achilles though Father of Neoptolemus, was of that noble and generous spirit, that he disdained even victory it self, if not obtained by more manhood.

_Thus Euripides also,_

_Generosus animus hostibus suntim necem _
Inferre necit._

_____A gallant soul hath he _
That scorn by deceit to kill his Enemy._

The like we read of Alexander, who being advised to circumvent his Enemies by some wife: answered, Se volo furari victoriam; That he scorned to steal a victory. The like Polybius testifies of the Achaian, That they hated to use fraud though against their Enemies, cleaving that the fairest victory, which by the confession of their Enemies was so. Such were the Ancient Romans until the second Punick War, infomuch that Thian appropriates this honour to the Romans above all Nations; that they overcame their Enemies, not by craft or subtlety, but by plain force. And when Perseus the Macedonian King, was deceived with the hopes of Peace; the old Senators disowned such Roman arts, denying that their Ancestors (who gloried more in valour than in fraud) did ever manage their Wars, with that willines which the Carthaginians, or with such deceit as the Grecians used, with whom it was ever held more honourable to circumvent their Enemies by stratagems, than to overcome them in plain Battel; adding withal, That sometimes wit might prevail against valour for the present; but that his courage was so far greater which was convinced, that in a pious and a just War, he was not by fraud, nor by chance, but fighting hand to hand with his whole strength in plain Battel unaccomplished: Yea and in latter times, Tacitus testifies of them, That the Roman people sought revenge upon their Enemies, neither by craft nor treachery, but openly and by force of Arms. Such also were the Tiberine, who always proclaimed as the time, to the place, when and where they would give battel to their Enemies. And such were the Achaisans, as Polybius testifies. The like doth Mardonius in Herodotus record of the Grecians of his time. (When James the fourth of Scotland, invaded the North of England with a powerful Army, Thomas E. of Surrey sent an Herald to him to let him know, that on the Friday following he would give him Battel in cafe he would fly so long in England; And Thomas his Son, sent the King word, that he would spare none save the King himself; and that he might find him in the van of his Army.) But this (as I said before) proceeds rather from magnanimity of spirit, and confidence in our own strength, than from the justice of the thing.

As to the manner, how the War should be prosecuted, this rule is pertinent. What is unlawful for a man to do, is also unlawful for another to compel or persuade him to do, whereof let these suffice for examples. It is unlawful for any subject to kill his Prince, or to deliver up a Town or Fort without the consent of a Council of War, or to plunder his

_Carm. lib. 4; Od. 6._

_Ros._

_Scholafit upon that place in Horat._

Matt. 12, 33._

Rom. 12, 9._

XXI We must not enforce a man to do that which he cannot lawfully do.
his fellow Subjects. And therefore it is likewise unlawful for me being an Enemy, to persuade another Prince's Subjects remaining so to do it. For evermore, He that occasionally another man to sin, doth therein sin himself: Neither is it sufficient to say, That it is lawful for him that excites such a man to do such a villainous act, to do it himself; for it is true, that it may be lawful for him to kill him, but not to do it in that manner. For that of St. Augustine is very true, *Nobil interj et triumphus commissus, an alium propter te admittere se velit; It matters not much, whether a man do commit wickedness himself, or cause another to do it for him.*

But it is another thing, if such a person shall freely offer himself, without any indignation from us; for it is not unlawful for us to make use of him, as an instrument to effect that, which it is lawful for us to do, as we have already proved by the example of God himself*. Transfugam jure bellii recipimus, faith Celsum; that is, It is no way repugnant to the Law of Arms, to receive Renegades into protection, and to make use of them. Neither are such to be delivered up, unless it be so agreed by the Articles of Peace.

## C H A P. II.

### How Subjects Goods become liable to their Princes Debts.

I. *Naturally no man is bound by the fall of another, but the heir only.*

II. Yet *by the Law of Nations, the Goods and Alls of Subjects* are liable to the debts of the Prince.

III. An example wherein in the taking of men Prisoners.

IV. And in seizing their Goods.

V. *Which is lawful, when the Right is denied,* and when that is; *where is also slewed, that though the thing be adjudged, yet it neither gives nor takes away any man's Right.*

VI. That the lives of innocent Subjects are not liable to satisfy the Princes debt.

VII. The difference herein between the Civil Law, and the Law of Nations.
ed by 

Subject's Goods liable to their Princes Debts.

ed by justitium among: tho' those Laws which cullum had found requisite to be constituated, for the relief of humane necessity. Neither will this be found so repugnant to nature, that it might not be introduced by cullum and by the tacite consent of Nations, seeing that Sivets do stand firmly bound for other men's debts, without any other cause than by their voluntary subjection only. And very probable it is that the Members of any one Society may more easily be relieved one by another, than Strangers can, whose complaints, though never so just, are little regarded in many places. Besides, the benefit that arises from this obligation, being common to all Nations, they that find themselves aggrieved by it at one time, may be relieved by it some other. Nor is this cullum in force only where there is a perfect and compleat War between Nation and Nation. (For what is lawful in such Wars appears by the very words of their denunciation, Against the ancient Latine People, and a-against the men of Old Latium, I pronounce and make war, faith the Roman Herod the Roman.) So likewise when the Heralds demand the peoples consent, they say, It is your will and pleasure that War be forthwith denounced against King Philip, and his Subjects, and against all that are under his Government. So also in the Decree it self, The Roman people do proclaim War against the Hermantician people, and against the men of Hermantun: which is all one as what in another place is expressed in thef words, Hiftis fit the, quomlibet populi ejus juris, &c. Let him be declared an enemy, and whatsoever be his laws, or his pretexts. But this cullum is in force even where there is no perfect war absolutely denounced, but where notwithstanding a certain violent prosecution of our right is necessary, which is, as it were, an inchoate and imperfect War. It is worth our observation what Arilocrates answered to Pharnabæus, being a Subject to the Persian King, O Pharnabæus, when he offered we were enemies to the King of Peridia, we dealt friendly with all that appartenant unto him; so now being his enemies, we will do all his as enemies; and therefore since then are willing to depend upon his protection, we may lawfully weaken him by thee. The learned Damofenes doth prudently distinguish between the taking of Prizes or Reprizes for the recovery of debts, or separation of damages, and the making of War, which he illustrates by the example of King Herod; For whom, though it were not lawful to make war upon the Arabians, yet was it lawful for him, Sertorius, to take the Prizes throughout all Arabia for the five hundred Talents due unto him, if not paid by a certain day appointed; for so it was expressly commended between them: and therefore Herod did rightly deny that to be the making of War, which was but a just and lawful way to recover his own right.

A branch of the execution of this right was that which the Athenians called ar理想化, as the making men Prisoners; concerning which the Attick Law was this, If any man had been by forcible assaults killed by a Stranger, the next of kin had a right to take any three men Prisoners, but no more, and to detain them until the Murderer were either punished, or delivered up to be punished. Hence we may perceive, That there is a kind of incorporeal right of Subjects, that is, a liberty (as live where, and to do what they please) engaged for the debts of every Society, which ought to punish fuch of their own Citizens as shall dare to injure those of another Society; for that any of the Members of that Society that shall neglect or refuse to do it, if taken and be held in bonds, unless the Society do what they ought; that is, unless they either punish or deliver up the Offender. For although the Egyptians (as Diodorus tells it) did maintain, That it was not just to imprison a man for debt; yet is there nothing in it repugnant to nature. And the general practice not only of the Grecians, but of most other Nations, is sufficient to warrant the contrary. Arilocrates, who was Contemporary with Demophenes, demanded, That a Decree might pass, That whosoever should kill Charidemus, should be taken away from what piece forever; and that whosoever should make resistance, should be held as an enemy. In which Decree Demophenes observes these errors: First, that Arilocrates did not distinguish between the putting to death of Charidemus justly or unjustly, seeing that possible it was that he might deserve death; next that he did not require that judgment should first be demanded against him: And thirdly, that not they amongst whom he should be killed, but they that should receive the murtherer being escaped into protection should be prosecuted as enemies. Demophenes his words are to this purpose. If a murther be commited amongst any people, and they refuse either to punish or to deliver up the murtherer, the Law allows the apprehension of three men; but Arilocrates leaves them men untouched, and not so much as mentions them; but would have those perfected as enemies who have according to the Common Right of Nations concerning suppliants received him that hath escaped by flight, for so I put the case, into protection, unless they deliver him. The fourth thing that he reproves, is, that Arilocrates would instantly bring it to an absolute War; whereas the Law requires only the detention of three men. Of these four exceptions, that Demophenes takes against Arilocrates his Decree, the first, the second, and the fourth are not altogether without reason; but for the third, unless restrained to the sole event of the murther done, either accidentally, or in the defence of himself, I cannot perceive why it should be mentioned, unless it were like an Orator for arguments fake, rather than truly or justly: for as we
said before, That Right which all men challenge of receiving and defending Suppliants, doth concern those only whom Fortune, and not their own crimes have made miserable; for otherwise there is the same Law for those amongst whom the crime is committed, as for those who refuse either to punish or deliver the guilty. And surely either the Law it fell cited by Demophoens hath through cuthfin been thus interpreted, or against such cavils was afterwards more liquidi express; the truth of one of these, none will deny, that reads that of Julius Pollix, whose words are these, \[The taking of men prisoners is then lawful, when a man having demanded Homicides, (who have fled for safety to others) cannot receive them: For the right of apprehending three men lies against those, who having received malefactors into protection, refuse either to deliver them, or to punish them according to Law.\] The like we find in Harpocrates, \[The Right of taking prisoners is a Right to snatch away some men from some other City: For it was an ancient custom against such Cities as received Malefactors, and refused either to punish them, or to deliver them to be punished, to make use of this Right of Piagnation.\] The like may be done by any City whose Citizen hath been manifestly and injuriously taken away and detained from them. Thus we read, that at Carthage there were some that opposed the taking of Ariston the Tyrian prisoner upon this ground, \[That the like would be done against the Carthaginians, both at Tyre, and at other Mart Towns, where the Carthaginians used to traffic.\]

Another kind of forcible execution of this Right, is the taking of Goods between the People of divers Nations, which our Modern Lawyers call Reprizals, or a violent seizing and detention of each others Goods, which the English and the Saxons call Withernam, and the French, (even where it is wont to be obtained from the King) Letters of Marque: which also are frequently granted, and are of force, as Lawyers say, where Right is denied.

And this may be presumed, not only when they cannot in any reasonable time obtain judgment against a defaulter or a debtor: But when in a Cafe that will hardly admit of any doubt, sentence shall pass plainly against Right; for Cases that are ambiguous, the definitive power is supposed to be in the Delegates, as perions publickly chosen to do Justice, whose Authority notwithstanding is not of the same force to oblige strangers, as their own Subjects: nay, even between their own Subjects, it makes not a debt void, that was justly due: For as Paulinus the Lawyer observes, \[Verum debitor, legat absolutus sit, natura tamen debitor, permanent; \] He that owes a real debt, though he be discharged by the sentence of the Judge, yet by the Law of Nature stands still obliged. And when by the injury of the Judge, a Creditor has taken away from the right Owner something that had not been the Debtors, as if engaged unto him: the question being put, Whether the debt being paid, that thing were to be restored to the debtor; Secvola proved that it ought to be restored. But between a Subject and a Stranger, there is this difference, Subjects are bound up by the Sentence of the Judge, though it be unjust, so as they can neither resist the execution of it lawfully; nor by force recover their own Right against a Sentence unjustly given, by reason of the efficacy of that power they live under: But Strangers have a coercive power, though it be not lawful for them to use it so long as they may recover their Right in a Judicial way: wherefore in such a Cafe, that both the Perons, and the moveable Goods of his Subjects that refuse to restore what is violently taken away, may be by the like violence taken, is not introduced by Nature, but by Custom generally received in all Nations. The most ancient Example of this we may read of in Homer's Iliads, where Nefor is said to drive away the Cattle of the Eldenfar; because they had before plundered his Fathers Harjes: whereupon as the story goes on, Proclamation was made, That every man to whom the Eldenfar did owe any thing, should come and partake of the spoil, in such a manner, as that every man might have his just proportion. Another Example we have of this in the Roman History, where Archelaumen Tarquin's heir, feizeth the Roman Ships lying in Harbor at Carthage, which he detained for the Goods of the Tarquinians detained in Rome. And in Aristotle we find a Decree against the Carthaginians to seize all foreign ships, if any man had a Right to do.

It hath haply been believed among some people, that the lives of innocent Subjects do stand engaged upon the like account, and that haply upon this pretension, that every man hath an Absolute Power over his own life, which Power may be transferred unto the Common-wealth, which is very imbrobale; and as we have already said, not consistent with found Divinity; yet it may fall out, that such Subjects may be killed, though not intentionally, yet accidentally, namely, when they shall attempt by force to impede the execution of this Right. But yet if such a mischief may be foreseen, we are obliged by the Law of Charity to forbear the prosecution of our Right, as we have elsewhere shew'd; since by that Law, we that are Christians especially ought to fet a greater value upon the life of a Man, than upon our Goods, as we have elsewhere proved.

Moreover as well in this, as in several other Cases, we must take heed, That we distinguish between those things that are properly due by the Law of Nations, and those that
that are due by the Civil Law, or by a mutual agreement between some people. By the Law of Nations, all Subjects that are injurious unto the Subjects of another Prince are liable to this Law of Reprisals, especially if they have occasion to reside there, whether they be Natives or Strangers; but not if they be only Travellers, or sojourn there but for a little time. For these Pignorations are of the fame nature with Taxes, which being raised for the discharge of publick debts, are imposed on such as are constant Inhabitants, and not on such as are Sojourners, and so subject to the Laws of the place for a while only. Neither are the Perfons or the Goods of Embassadors, being not lent to our Enemies, any ways liable to this right of Pignorations by the Law of Nations; as also in many places the persons of Women and Children are by the Civil Law often exempted: But even the Goods of such as addict themselves to Learning or to Merchandizing, may by the Law of Nations be taken by any, as their persons also were at Athens. But by the Civil Law of many places, this Right of seizing Goods or Perfons, must first be demanded by the Supreme Power, but in other places from the Judges. By the Laws of Nations the Propriety of things taken palfeth immediately to him that takes them to the value of his principal debt, together with his charges, so as the remainder ought to be restored. Thus did the Venetians to the Genoese, as Gregorius relates; whose ships, faith he, being taken as Galata, laden with Wheat, Barly, and Salt for Fish, whereof the Lakes of Copais, and Mestis, and the River Tanais affords great plenty, they did not diminish the least part of the Goods, but took great care to preserve them, until having received their just debts, they restored all they had taken entirely. By the Civil Law they that have any share in the Prizes taken are usually cited, and being adjudged lawfull, they are by publick Authority fold and divided among such as are concerned in them. But to be better informed in these and the like Cafes we must consult such as have treated of the Civil Law, especially Bartolus, who hath written much concerning the matter of Reprisals. One thing I shall here add, because it serves somewhat to allay and qualify the severity of this Law, in it self too rigid, namely, That they who either by the non-payment of what they owe, or not doing that which is Right to such as they have wronged, do occasion the seizing of their fellow-Subjects Goods, are bound by the Laws both of God and of Nature to make satisfaction for those losses, which other men through their faults have sustained. Thus Plutarch of the Sycames, Many of them, faith he, would not contribute money, but commanded those that had either received or taken away other mens Goods to repair their loss.
CHAP. III.

Of a Just or Solemn War, according to the Law of Nations; and of its Denunciation.

I. That a Solemn War by the Law of Nations ought to be between divers people.

II. A distinction between a Nation, though doing unjustly, and a company of Thieves and Pyratts.

III. Yet sometimes there happens to be a change.

IV. It is requisite to a Solemn War, that he that makes it should have Sovereign Power; and bow this is to be understood.

V. And that the War be solemnly denounced.

VI. Whereunto what by the Law of Nature, and what properly by the Law of Nations is required, is handled distinctly.

VII. The denunciation of War is sometimes conditional, sometimes simple and absolute.

VIII. In denunciations, what belongs to the Civil Law, and not to the Law of Nations.

IX. War being denounced against a Prince, is denounced also against his Subjects and Associates, so far forth as they follow him.

X. But not as by themselves considered; this illustrated by examples.

XI. The reason why denunciation is requisite to some effects of War.

XII. That these effects are not to be found in other Wars.

XIII. Whether a War may be made as soon as it is denounced.

XIV. Whether against him that hath violated the Rights of Embassadors a War may be made, though not denounced.

We have already said *, That according to the Opinion of the best Authors, a War is oft-times said to be Just, not from the Cause that excites it, nor from those Heroick Actions that are done in it, but from some peculiar effects of Right which one War hath more than another. But what manner of War this is, is best understood by the definition which the Romans give of an enemy, Hostes sunt quisquis, antiquus non publicum bellum decremminus; They are Enemies, faith Pomponius, against whom we publicly denounce War, or who do the like against us; the rest are but Pyratts and Robbers: to the very same purpose speaks Olpian: Wherefore as he there adds, He that is taken by Robbers, is not a flave to those that take him, neither need he recover his freedom by the Right of Pollinium, as one that returns out of Captivity doth. A Pyratis ant latronibus captus, liber permanet, faith Paulius the Lawyer: He that is taken prisoner by a Robber or a Pyrat is not thereby the priviledge of a Citizen, as he doth, that is taken prisoner in War by the Germans, or by the Partitions. Whereunto we may add that of Ulpeus, In Civil Diffentions, although the Common-Wealth be dangerously wounded, yet doth not the Contest extend to the ruine of the State; they that betake themselves to either part are not such mortal Enemies, as they are to whom the Right of captivating men, and of Pollinium belong: And therefore though they be taken and held, yet whenever they shall recover their liberty, they shall not need to petition their Prince to restore them to their Freedom, because they never lost it by a just Captivity. This only is to be observed, That under the Example of the People of Rome, whosoever in any City or Common-wealth hath the Hypercive Power, hath a Right to make a Just War; according to that of Cicero, Ille hostis est, qui habet Rempublicam, Curiam, &Aramum, &c. He is accounted an Enemy who enjoys a Common-Wealth, a Court, a Treasury, the Content and Concord of Citizens, with some regard had, if the matter require it to Peace and Leagues: The word Hostis signifies properly an Equal, which Pyratts and Robbers cannot be to Sovereign Princes; and therefore they cannot be said to make a Just War.

Neither doth a Common-wealth cease to be a Common-wealth, because some Acts of Injustice are publicly and generally committed by them; nor are Robbers or Pyratts to be deemed a Civil Society, because haply they do observe some kind of equality between themselves, without which no Society can poibly long subsist: For these latter are not (as Procopius speaks *) Turba dominarum, Leges congrasses, sed injustitia caussa, in unam colecta, A Company of men associated under a Law, but forced to unite, to defend themselves against the Law: whereas the former, though guilty sometimes of some injustice, and do not without some faults, yet do they associate for the defence of their own Right, and do Right unto Foreigners, though haply not in all things according to the Law of Nature, which in many places is almost obliterated; yet certainly according to those Covenants and Agreements which they have made with every Nation, or according to the Customs by them used. This the Scholiast upon Thucydides observes, That whilst the Greeks preached Pyracy as a lawfull Calling, they at the same time abstained from Murther, from robbing
robbing by night, and from driving away the Oxen that ploughed the earth. And Strabo
records it of divers other Nations, who though they lived by Piracy; yet as soon as they
returned home, would fend to the right Owners, that if they would they might redeem
their Goods at indifferent prizes. And hitherto we may also refer that of Homer:

Ips etiam rapii avidi, got aliena peroeruant
Liitorta, convexi Superimrj fi prada reperta ess,
Nativus impletus aetnnt, & velu rerorquent:
Quippe Deos metunt, memores famdi aegne nefandi.

Greedy of Gain to foreign Coasts they stray;
If by their flary Guides they find a prey,
With faith retort they go, their Ships full fraught,
Fearing the Gods, minding what's good, what's nought.

The Ancient Normans accounted Piracy an honourable Trade to live by. And Plutarch
notes of the Scipi, that they were extremely corrupt (yet a Commonwealth) although
they robbed even fuch Merchants, as came in a friendly way to traffick with them; but
in Morals the principal part gives form to the whole: And as Cicero well observed, Be-
causelit contains the most parts, and spreads farthest, therefore it gives denomination to the whole.
To the fame fenfe is that of Afton. In tempemperations the denomination is always taken from
that which is the greatest portion. Wherefore Cicero is very crude in his expression in saying,
That when the King is unjust, the Nobles unjust, and the generality of the People so, it
is not so properly a corrupt Commonwealth, as none at all: which sentence of Cicero's, St.
Augustine thus corrects, Neither can I therefore say truly, that that people are no people, or
that Commonwealth no Commonwealth, so long as there remains any society of a rational multitude,
unanimously congregated for the mutual defence of such things as they love. A Body though dif-
trusted yet remains a Body; and a City is still a City so long as it hath Laws, and executes
judgments, and hath other means necessary to build up the just Rights. That which Dion Chrysifome observes, comes much nearer to truth, who tells us, That the Law (especially of that Nations) is in a City, as the Soul in an humane Body; which being taken away, it remains no longer a City. So likewise Cicero
in another place, There were neither Laws nor judgments, nor any sign to there that there was
a Commonwealth. Aristides in his perorative Oration to the Romans for Peace, proves
that many Good Laws may very well consist even with Pirany. And Aristote informs us,
That he that trains the power, either of the Nobles or of the People, to too high a key, marrs the Harmony of good Government; and first corrupts the Commonwealth, and then destroys it. Let us illustrate this by examples: That they who are taken by Robbers, are
not made slaves, was (as we have faid) the opinion of Ulpian. But if a Roman Citizen
was taken by the Germans or Parthians, he lost his freedom; and yet among the Germans, the
Robbers that were done without the bounds of the City were blamed less, which are
Cafius own words. Tacitus records it of the Germanes, that they were, Genti Laroci-
miis socianda, sed Gentis tamens; A Nation wholly added to Robbers, but yet a Nation though.
The Illirians spoild all they met at Sea without regard; but yet to him that subdued
them, was a triumph granted; which was denied to Pompey who had purged the Sea of Pir-
ates. So great is the difference between a Nation though corrupt, and a company of men
combined only to do mischief.

Yet a change doth sometimes happen, not in particular persons only; as in Jeptha, Ar-
istes, Varrnus, who of Captains over Thieves and Robbers, became lawful Commanders; but
in Societies also: As when a company of Robbers or Pirates shall forake that wicked kind
of life, and unanimously betake themselves to a Civil Government, an example whereof we have in the Mamertines. St. Augustine concerning Robberies speaks thus, When
this mischief by the concourse of men of desperate fortunes, grows so great, that they betake themselves to some certain place or inhabit, and there build Cities, raise Forts, and thereby are able to subdue Na tions; then it assumes the title of a Kingdom or free State: Not, as St. Augustine goes on, that they cease to be what before they were; but because what they formerly did through fear, and therefore secretly, they now do with boldness and confidence. It was a bold answer, that Diome-
des the Pirate made to Alexander the Great, when he demanded of him the reason why he so
troubled the Seas: For the fame (faith he) that thou dost the World: But because I rob with one single Ship, I am called a Pirate; whereas thou, because with a great Fleet, art therefore fild an Em-
peror. But that which makes this change according to what is here intended, is not fo
much their impudence as their repentance. For this St. Augustine requires, that deferting
their wicked courses; they live together under some wholftom Laws, according unto which,
Justice may be adminiftr'd, as well to strangers, as natives.

M m m 2
Who
Of a just and solemn War.

BOOK III.

IV.

A solemn War ought to be between such as have Sovereign Power.

Who they are that have foreign Power we have already shewed, from whence we may also collect, That he that hath that power but for a part, may for that part make a just War; much more, they who are not Subjects but Confederates, though on Articles very unequal. Thus were all the Wars between the Romans and their Confederates, the Volcians, Latins, Spaniards, and Carthaginians, just; though their Confederacies were made on very unequal terms, as we may collect out of Histories.

Neither is it sufficient to denominate a War, in this sense just, that it is made between such as have foreign Power: But as we have heard before, it must be publicly declared; yea so publicly, that both parties may have equal knowledge thereof, which Ennus calls the proclaiming of War, Bellum inferre non ante denuntiandum, injijium esse; To make War before it be denounced is injurio: to exercise Hostility without denouncing War or requiring satisfaction, is not done like a Christian, nor allowable by the Law of Nations; as the English Ambassador told the Emperor of Russia. And therefore as Cicero well observes, To determine of the equity of a War, it was a Right proper to the Colleger of: Heralds which was a monop; the Romans held very sacred; thereby giving us to understand, that no War could be just, but that which was made, either for the recovery of things unjustly taken away, or publicly declared and solemnly proclaimed. Not so clear is that of an Ancient Writer, quoted by Festor, That War is just which is made by publick Edit, either for the recovery of our own, or for retailing an invading enemy. Livy describes a just War thus. That War which is openly declared by publick Edit, and solemnly denounced, is just, that is, if it be done by such persons as have the supreme Authority. And the same Author having first declared, That the Epirots had war against the Territories of Athens, faith, That the Athenians were forth high incensed against the Epirots, and afterwards, agreeing with the Decrees of their Cities, first voluntarily declared, and then waged against them a just War.

For the clearer understanding of this and the like places, which concern the denunciation of War, we must accurately distinguish what things are due by the strict Law of Nature; and what things are honest and commendable, though not by nature due. Thirdly, What things are by the Law of Nations required to the obtaining of the proper effects of the right of Nations; and lastly, What things do arise from the peculiar Laws and Customs of some people. By the Law of Nature, where Force cannot be repelled but by force, and where punishment cannot be demanded but in the hands of the Offender; there the denouncing of War is needless. Shenendidas in Thucydides pleads thus, Non est quod verbis 
judicis decempenmis utraque verba lege; "Tis vain to contest with words and arguments, when the wrongs which we manfully sustain, are more than verbal. Thus likewise do the Plataeans in the same Author pleas; By that Law that is received by all Nations, it is lawful to repel him by force that shall invade us for an enemy. So Flaminus to Diodorus says, calls all, both Gods and men, to witness, That according to this Law, the King, and not himself, was the Aggressor. And if so, then as Latinus in Haliacarnassius notes, Every man that the by a War damned, may right himself upon him that began it. And is Elian out of Plato, Quod ad propagandam sinum captitum Bellum, non a Caducatore, sed a natura indigenter; That war that is made against an Invader, needs no other Herald to proclaim it then nature it self. And herein is that of Dion Chrysostome verified, That many wars are made, which were never denounced. Neither is there any thing else that Livy blames in Menippus King Antiochus's General, but that he had slain certain Romans before any war was denounced, or any hostile act had proceeded so far as either to the drawing of a weapon, or the effusion of blood in any place; intimating thereby, That in either of these cases that fact of Menippus had been justifiable. Neither doth the Law of Nature necessarily require, That the right Owner being to apprehend what is his own, should first denounce war, or declare his intention before he do it. But so often as one thing is to be taken in lieu of another, or the Goods of a Debtor attached for a Debt; there a predemand is necessary: much more is it necessary when the Goods of Subjects are to be seized for the Debt of their Prince, that thereby it may appear, That we had no other means or way left, but by war to recover either our own, or what is due unto us. For the right that we have in the things so seized, is no primarly, but a farrogated right, as we have elsewhere declared. The like may be said of him who hath the supreme Authority, who cannot justly be invaded for either the debts or the faults of his Subjects, until satisfaction hath been demanded; which if denied, renders the Prince also culpable, either by participating with them in the wrong done, or at least by omitting what he ought to do, according to those Rules which we have elsewhere given. Nay farther; even where the Law of Nature doth not require any such demand to be made, yet may it be done both honestly and honourably, to the end that men may be more careful to abstain from giving offence; and that those already given, may be expiated by confession and satisfaction: according to those Rules which I have already prescribed for the prevention of such mischiff which do usually accompany War, whereunto even that also appertains:

Extrema
Extrema primo nemo tentavit loco.

No man at first unto extremes will fly.

When all Israel were ready to fall on the Gibeonites to revenge the outrage done to the Levites Wife, the Elders restrained them, urging, That it was not fit that they (who were forbidden by the Law, rashly to make war upon Strangers, though justly provoked, still by their Ambassadors they had sought all means to induce them to do them justice) should unwisely fall upon their Brethren, until they had first heard their grievances and denied satisfaction. And as to that Command which God gave unto the Israelites, Deut. 20. 2. namely, That before they fought against any City, they should offer them peace. It was peculiarly given to that Nation, and therefore not at all to be confounded with the Law of Nations. Nor was that peace which was so offered an absolute peace, but on this Condition, that they would submit and pay tribute. When Cyrus had march'd with his Army into Armenia, he forbore all hostile acts till he had sent Ambassadors to the King to require of him the Tribute and Succours by the League due; esteeming it (as Xenophon speaks) more friendly thus to proceed, than to act further, until he had declared the ground of the War. Nevertheless by the Law of Nations, as to those peculiar effects of a just War, a public declaration is in all cases requisite, if not on both sides, yet on one.

This denunciation of War is sometimes conditional, and sometimes absolute. Conditional, when restitution or satisfaction is demanded at the same time when the War is denounced. Now the Fecial Law (whereby the Heralds are guided) do under the Notion of things demanded, comprehend not only a vindication of what is due by the right of dominion, but the perfection also of whatsoever is due, either upon any civil account, or by reason of any crime committed, as Servius rightly expounds it. Hence it is, that in all such Conditional Denunciations we read either of some things to be restored, or some damages to be repaired, or some Offenders to be delivered up; unless they from whom such Offenders are demanded, shall chuse rather to punish them themselves, as we have elsewhere said. And that this solemn Demand of things was called Clarigationem, or a proclaiming of War, Polybius tells in these words, Et Legatium ad Hostes claritatum mitte; et id, res rapt at claris repetitum, unusque Verbarum vocabatur; And Ambassadors, when sent to their enemies to demand with a loud voice restitution of things taken away by force, one of them was called Verbarium, an Heralds, because he was always crowned with Verum. And in another place, speaking of Verbin, he faith, That it is that Herb which Ambassadors and Heralds do usually carry with them to their enemies, as we have elsewhere shewed. One example of this conditional denouncing of War we have in Levy, in these words, Which injuriies, unless redressed by those that occasioned them, they are resolved with all their power to revenge. Another we have in Tacitus, Of poplicium in males praesumant, usuram promiscua Cede; Unless punishment be inflicted on the Malefactors, they will seek their revenge by War. And of this kind of proclaiming War we have an ancient Precedent in Euripides, where Theseus gives this Charge to his Ambassadors:

Vicina Theseus qui tenet Regni sola
Humare poeit mortuos; quod si datur,
Sit amica faciet Gens Erectidum tibi.
Hac si probantur, tam refer retro pedem;
Sin nemo partes, verba sent hac altera;
Jam Max ut Arma pubis expellet mea.

All which Papinius, rehearsing the same Story, abbreviates in this Verfe, Graves for the slain, or War against Thebes proclaim.

A pure or absolute denunciation is that which is especially called an Indiction or Proclamation, which is either when the other Party hath already begun the War (which is that which in Isidore is called a War to repel the force of an invading Enemy;) or when he himself hath committed that which deserves to be punished. Sometimes after a denunciation that is conditional, there follows another that is pure and absolute, though not necessarily, yet redundantly. Hence aritheth that usual Form, Tefor hunc Populum injuqum esse, necque jus vddere; I declare this Nation to be unjust, neither will they do right. And this other Form, Concerning which matters, differences and causes, Remonstrance hath been given by the Chief Herald at Arms of the People of Rome, to the Chief Herald at Arms of the Ancient Latins, and of the People of the Ancient Latins; but yet neither have they paid, given or done any of those things which they should have paid, given or done; wherefore I do judge, agree and ordain, That satisfaction be fought by an open and a just War. Whereunto we may add a third

The Greeks call this Προειδολογία, to declare Re-Prizes lawful.
third Form, which follows, *Because the people of the Ancient Latines have injured the people of Rome, and failed in what they ought to have done, and because the people of Rome have decreed to make war against the Ancient Latines, therefore I and the people of Rome do denounce and make war against the Ancient Latines.* But yet that the denouncing of War is not in this case (as I have said) precisely necessary, is plain by this, That it is sufficient if it be proclaimed but at the next Garrison. For thus it was adjudged by the Heralds, as well in the case of *Philip of Macedon,* as afterwards in the case of *Antiochus,* *Since he is first to denounce the War that seeks satisfaction by the War.* Nay, the War that the Romans made against *Tyrrhus* was denounced but to one of his Souldiers, and that in the Flamian Cirque only. Besides, this also gives an occasion to another needleless Observation, That War is sometimes solemnly denounced on both sides; *as* that Peloponese War, which was made between the Corcyrians and the Corinthians; whereas had it been proclaimed but on one side only, it had been sufficient.

That Heralds were usually sent to denounce War among the *Gracians,* clad with party-coloured Coats, and armed with a bloody Javelin by the *Aegidi* first, and afterwards in imitation of them by the *Romans.* That there should be a Solemn renunciation of all former friendship and alliance, (if any such there were) after thirty days demand of reparation for damages received; *And that the King of the Heralds should again thrust his Spear into the enemies ground,* as *Servius* upon the ninth of *Virgils* *Aeneid* records, and the like, are not dictates of the Law of Nations, but are Ceremonies arising from the Customs and Inimitates of some particular Nation, many of which *Arnobius* confef-ted, were antiquated in his time, and some of them grown out of use even in *Varrus.* The third Punick War was as soon made as denounced, and it was the Opinion of *Men.
Now where some note, and by examples teach, that even in such Wars as these, whatever is taken away immediately becomes his that takes it: I answer, That this is true but on one side only, and that likewise by the Law of Nature, but not by the voluntary Law of Nations, which makes provision for the safety of Nations only, and not of those who are either no Nation, or but a corrupt part of one. They likewise are in an error, who conceive, that in a War undertaken for the defence either of our own persons or our Goods, there needs no Denunciation: for even in such a War Denunciation is altogether necessary, though not simply, yet to the obtaining the effects proper to a Just War, as we have already hinted, and shall hereafter more fully explain.

Neither are they in the right who hold, That War cannot justly be as soon made as it is denounced, which Jesus did against the Armenians, and the Romans against the Caucasians, as I said before. For the Law of Nations requires not that any time should be allowed, the War being denounced; yet notwithstanding the nature and quality of the business may haply require that some time be given, as in cafe Reditus be demanded, or punishment against an Offender, but not as yet denied: For in these Cases convenient time is to be granted for the doing of it.

Nay, though the Rights of Embassadors should be violated, yet it will not thence follow, That to the attaining those Effects, which are proper to a just War, Denunciation is not necessary; for it is sufficient if it be done either by Citation, Declaration, Proclamation, or any other safe way or means, as is customarily done in such places, whereunto we cannot without danger approach.

**C H A P. IV.**

That in a solemn War, the Right of killing Enemies is by the Law of Nations granted.

I. The effects of a solemn War generally explained.
II. The word Lawful distinguishing, into what may be done without blame, though it may be more commendably otherwise; and what is done is unpunishable.
III. That the effects of a solemn War generally considered, are therefore lawful because unpunishable.
IV. Why such effects were introduced.
V. Divers testimonies concerning those effects.
VI. In this sense it is lawful to kill, or any other ways to distress all that reside in an Enemies Territories.
VII. What if they came thither before the War.
VIII. That the Subjects of an Enemy may in any place be assaulted, unless protected by the Laws of a foreign Prince.
IX. That this licence extends to Women and Infants.

X. Tua, and to Captives, and that at all times.
XI. Tua, even unto such as are willing to yield themselves, if not accepted of.
XII. Also unto such as surrender themselves without condition.
XIII. That this Right ought not to be referred to any other cause, as to Retaliation, Obligatory, &c.
XIV. That this licence may be extended even to Hostages.
XV. By the Law of Nations it is forbidden to kill by Paymen.
XVI. Or to Impose either Waters or Weapons.
XVII. But not any other ways to corrupt their Waters.
XVIII. Whether the Law of Nations will admit the killing of an Enemy by a private Murder, explained.
XIX. Whether the ravishing of women be permitted by the Law of Nations.

S E R V I U S upon this Verse of Virgils,


Then lawful 'twas to fight, to kill and spoil.

deriving the several Laws from Ancus Martius, and upwards from the Equicola, tells us, That when any great injuries were done unto the Romans by any other Nation, the Pater patriae, or President of the Colledge, with some other of the Herald's, whose office it was to contravert Leagues, and announce War; went to the borders of that Nation, and there with a loud voice proclaimed the cause of the War's, and if they did not restore the things taken, or deliver up the Offender.
It is lawful to kill our Enemies in a just War.

BOOK III.

offender within thirty days, then he shall be delivered into their Territories, which was the beginning of the War; that done, it was lawful for them to kill and spoil. He had before said, That the Ancients under Restarper, comprehended all manner of injuries; and under Rest redde, the restoring things, all manner of satisfaction, though there were nothing at all of rapine in the case: Whence we learn that a War solemnly denounced between two Nations, or their chief Magistrates hath some peculiar effects; which War in its own nature cannot challenge, all which are very agreeable to what we have already quoted from the Roman Lawyers.

Which words of Virgili that we may the better understand, we must note, That the word Lawful is taken in a twofold sense; for in the first place, that is said to be lawful which is altogether just and honest, though haply some other thing may be more commendably done; in which sense St Paul speaking of things in themselves indifferent, faith, All things are lawful for me, but all things are not expedient: As for example, to marry is lawful, but to contain it if he be with a pious intention is more laudable. For as Tertullian well observes, Continence would lose her best evidence, if to marry were unlawful. Virgini, faith St. Hierome, deserveth the greater honour, because what they may do without sin, they voluntarily disdain. And again, All those supereminent virtues, that lead to perfection, are left as Arbitrary to our Auditors: Nulla tibi imponitur necessitas, ut voluntas praemium consequatur: No necessity is imposed on thee, that thou dost truly, may receive the greater reward. St. Chrysostome speaking of Matrimony shews, That although it be lawful, yet it is better to abstain; and yet in his exposition on the seventh to the Romans, he faith, That to them which do not what they are commanded, Hell is denounced; thereby shewing, that things absolutely commanded, are not of the same nature with those that are left to their own free choice: As virginity and the renouncing of our possessions, because those that are commanded must of necessity be done. And therefore in his second Oration concerning Falling, He placeth virginity without the Ufet; and above that which we are commanded to strive for, unto which, as he that can attain, shews his Christian magnanimity, so he that shall fall short, easily obtains pardon. And in this sense also are second Marriages lawful, although to have been contented with one only would much better, as Clemens Alexandrinus tightly flutes the Question; where speaking of a man that had contracted a second Marriage, he faith, That although therein he sinned not, because there was no Law that forbade it; yet could he not be attain unto that perfection of holiness, that the Gospel seemed to command unto us. So for a believing Husband to put away his unbelieving Wife is lawful, as St. Augustine affirms, (which with what circumstantial it may be verified, it is not to our purpose in this place to discuss) but yet he may, and that haply more laudably retain her. Wherefore he adds, Both are equally lawful, according to the rules of Divine Justice; for neither of them are prohibited by God, but yet both are not equally expedient. Opian concerning him that having sold his Wine, and covenedanted with the buyer, that if he fetch it not by such a day, it should be lawful for him to pour it out, faith, That although he may do it, yet, if he do it not, he is the more to be commended. Secondly, this word Lawful may be taken for that which is not punishable by humane Laws, although it consist not with Piety, or the rules of Morality; thus in many Countries fornication is lawful, that is, not punishable. Amongst the Lacedemonians and Egyptians theft was lawful. And in Quinarian we read, That there are some things, which though not in their own nature commendable, yet that are by the Laws tolerated; as by the Laws of the twelve Tables, The body of the Debtor might be divided among the Creditors; all which, though in themselves unfit and unequally, yet are by some Lawgivers permitted to avoid greater inconveniences: Licentia permagna est tentativa Disciplina; Licence, faith Tertullian, is for the most part but the touchstone of Discipline. All things, faith St. Paul, are lawful, but all things edify not. Now this acception of the word Lawful is somewhat improper, as Cicero tells us, in his Tusculans, where speaking of Cinnas, who had been four times Consul, and had caused divers of the chiefest of the Roman Nobility to be slain, faith, Thus shall we esteem this man happy; nay, on the contrary, I think him miserable, not because he committeth those things, but because he governs the Commonwealth, that he might lawfully commit them; not that it is lawful for any man to sin (Sed sermonis errore laboramus, dum illi dicamus, quod opus est concordiae;) But we are misled through the common error of speech, whilst we pronounce that lawful which is only permitted. Whence Colossetia concludes, That we ought not to profane our revenge to the utmost of what we may, for extreme severity is too near a Neighbour to extreme cruelty: Yet notwithstanding, though this acception of the word Lawful, be not done properly, yet it is among the Romans very frequent, as will appear by the name Cicero, who thus bepleaseth the Judges, Quod decent uos, non quantum licet vobis, sed nec debitis; Ye that are Judges ought to consider, not so much what is strictness of Law ye may do, but what in every case is most fit and convenient to be done; for if you regard your own power only, ye may put to death even whom you will. In the same sense, as it is usually said of Kings, That they may do even what they please, because they are exempted from the ties of humane Laws; yet is that advice which Claudian gives unto his Prince, much more worthy to be by all Princes received:


Resolution to do,
Not what you may, but what becometh you.

Aeschines highly blames those Princes who study more their own Prerogatives, than the Good of their Subjeets, and that say, thus and thus I can do, rather than thus and thus I ought to do. Hence it is, that we find these two words, Licer et Oportet, is lawful, and it behoves, placed sometimes in opposition one to the other: As in Annimnus Marcel. Lib. 30. line 11. Sunt aliquid que fieri non aportet, etiam si licet. Some things there are which are not fit to be done, though lawfully we may do them. So in Pliny's Epistle, Things that are dishonest we must avoid, not as they are unlawfull, but as they are shamefull. And as Cicero himself affirms the fame, Eft enim aliquid, quod non aportet, etiam si licet, Sometimes are not fit to be done, though lawfull. And in his Oration for the defence of Mulo, he distingiuished between fas and licet, attributing to the former, that which is agreeable to the Law of Nature, and to the later, that which was agreeable to the Laws of particular Countries. So Quintus the Father in one of his Declamations tells us, That it is one thing to look strictly to what is a man Right, (i.e.) to what a man may do; and another thing to reflect that which is just: Alud efi speciere jure, alud jufitiam.

In this senfe therefore it is lawful for one Enemy to hurt another, both in his Perfon, or in his Estate: It is lawful, I say, not only for him that makes War upon a Just ground, and that in the profession of that War contains himself within those bounds, which by the Law of Nature are prescribed to him, as we have already said, but for both parties, and that without distinction. So that he that doth thus injure his Enemy, though he be apprehended in another Princes Dominion, yet he can not be proceeded against as an Homicide, or as a Thief; neither can any other Prince for this only Cause make War upon him, and in this senfe is that of Salvius true: By the Law of Arms all things are lawfull to the Conqueror.

Now the Reaion of this so great a licence granted by all Nations, is this, because when two Nations are at War, for any other Nation to judge, where the Right is, has been dangerous; for by that means, that Nation may quickly be intangled in the others War, as the Marcellians pleaded in the Caufe of Caesar and Pompey: And therefore they confess, that they had neither Wisdom nor Power sufficient to determine, whether of them had the Jutter Caufe. Besides even where the War is manifestly Juft, it is a very nice thing by any outward token to judge which is the Juft Rule or Meafure, either of defending our Selues, of recovering our own Right, or of exacont Punishments: So that it is agreed, that it is much better to leave it to the Honesty and Confortie of the Princes engaged to determine of these things among themselves, than to refer it to the arbitrement of others. Thus did the Achaian demand of the Roman Senate, How it came to pass, that what had formerly been alt by the Right of War, should now fall into debate? Now besides this of licence and impunity, there is another effect of a Juft and Solemn War, namely, Dominion, whereof we shall treat hereafter.

But the licence that a Juft War gives to one Enemy against another, extends either to his perfon, or to his Estate: And first to the perfon of an Enemy, and hereof we have many testimonies recorded in the most approved Authors: The Greek Proverb acquiteth the Sounder for what he doth against the perfon of an Enemy in the time of War, in that it saith,

He guiltles is that doth his Enemy kill.

Euripides.

The custom of the ancient Grecians was not to wahr nor to eat with an Homicide, much les to join with him in any Duties that were holy, and yet with him that in the War ad killed an Enemy it was lawfull. And in all Authors we read, That to kill was jus bellum, the Right of War. Marcellus in Livy juftifie himself by this Right, Quicquid in bellis fecit, jus bellis defendet: Whatever I did among mine Enemies, the Law of Arms doth id. 21. extend me in. And so doth Ateon juftifie himself and his Soldiers to the Saguntines, Suff. Lib. 28. your Wives and your Children to be dragged about and ravelled before your faces, according to the licence given in Wars, for better it is with patience to endure those out-rages, than that they should have all to the sword. And the same Livy having declared, the general lallace of the Afiaphens adds, That it was done by the Right of War. Cicero likewise in his Oration for King Deiphrus pleads thus, And why, O Caesar, should he be subjudget as thine enemy, who could not forget, that whereas thou mightest have adjudged him even to death by the Law of Arms, thou madest both him and his Sons also Kings? And in another place he confesseth, That whereas Caesar, by the Right of a Conqueror might have sentenced them all to

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Pre M. Marci.
Yet we must observe, That when these Authors seem to justify such acts of cruelty by the Right of War, they do not altogether free them from sin, but from being punishable as sins, as will appear by other places in the same Authors. It was well said of Tacitus, In pace, causas & merita spectari, ubi bellum injustum innocentes na nocem justa cadere; Peace deth usually distinguishing of Causes and Merits, (and accordingly dispenses rewards and punishments) but in War the recent and innocent do fall ake. And in another place, speaking of a Common Trooper, who demanded of his Captains a Reward for killing his own Brother in the head of his Enemies Troops, he faith, Nec ille aut hancare exam edem jus hominum, nec ulciscir, ratio bella pertinerebat; Neither would the Laws of humanity suffer them to reward so unnatural a marther, nor the Law of Arms permit them to punish it. For that which Senea observes is very true;

And what he notes in his Epistles, Que commissa capite lercunt, tum quia paludati fuerunt, Luidamus, What in another we punish with death, that in a Sender under command we commend; wherewith accords that of S Cyprian. Homicidium cum admittit. mans, crimen est, virum vocatur cum publice gertat; That which in a time of peace is a capital crime, in the time of War is accounted value; but it is not the nature of their fault, but the extortion of their cruelty, that renders Souldiers unpunishable: And a little after he adds, Confessore Jews peccat, & capiti esse licitum quod publicum est; The Laws do approve at this, which is therefore sometimes reputed innocence because licened by publick authority. And in this sense it is true what Latarius faith of the Romans, that they did Levitique injurias inferre; Infest others lawfully: As that also of Lucan, Jufique datum fed et, which we may translate in the words of David, Wickednesses is pratised as by a Law.

But this Right of license or impunity in War extends it self very far, for it reacheth not only to such as are actually in Arms, but unto such only as are Subjects to thee Clances against whom the War is made, but unto all such as reside within their Territories or Dominions; as may appear by that form so often used in Livy, Hoftis fit ille, quique intra presidia sunt ejus; Let him, and all that live under his protection be held as enemies. And no marvel, seeing that by all such we may be dammified, which in a War that is lasting and universal, is sufficient to justify the licence here spoken of; otherwise than in Reprizrals or Pignorations, which, as I have said, was at the first introduced after the manner of Taxes for the payment of publick debts. Wherefore it is not to be wondered at, if, as Baldus notes, This licence in War, be much greater than that in Pignorations: Nor is there any question, but that Strangers coming into the Enemies Territories after the War is proclaimed and began, may be percuted as Enemies.

But as for those that went thither before the War was proclaimed, it is thought fit by the Law of Nations, that they should have some time allowed them to depart thence with their Goods; for so we read of the Corcyrons, That before they laid close siege to Epidamnum, they gave warning to all strangers to depart, or to be held as Enemies.

But such as are true and natural Subjects, if we have respect only to their persons, they may in all places whatsoever be percuted, because, as we have already shewed, when War is decreed and denounced, it is declared to be against a Prince or Nation, and the People thereof: So the Romans in their Decree against King Philip, did Will and Command that War should be proclaimed against him and the Macedonians under his Dominions. Now he that is an Enemy may by the Law of Nations be every where where persecuted, according to that of Euripides;

Ubiqueque presumum juras lated hestem sumus.
A Foe where ever found destroy'd may be.
And that of Marcianus, Renegadoes where ever they are met, may be killed as Enemies: And therefore, whether it be in their own Country, or in the Enemies, in a defart that belongs to none, or on the Sea, where ever it be, if found, they may lawfully be killed. But yet, that it is not lawful to kill them, or to spoil them in a Country that is in peace, this ariseth not from any Right that belongs properly to their persons, but from the Right of that Prince under whose Power and Protection they are. For all Civil Societies have a Right to Ordain, That no force or violence be offered against any in their Dominions, unless the differences be first examined in a judicial way; as we have already proved out of Euripides:

Si crimen istis aliquo hopitibus frui,

Jus imperatibus: vi quidem sine non abstrahes.

If charge thou canst thee Guefts with great offence,

Thou mayst have Right, but shalt not force them hence.

Where Laws flourisht, and Courts of Justice are open, there every man is punished according to his deserts; and then this promiscuous license of injuring each other caseth, which was only granted amongst Enemies in times of War only. Whilft the War raged between the Romans and the Carthaginians, it hapned that seven of the Carthaginian Gallies rode in a Port belonging to Syphax, who at that time was in League with both Nations: At which time Scipio with two of the Roman Gallies was by storm driven into the same Harbour before the Carthaginians could weigh anchor. It had been lawful for the Carthaginians to have taken or sunk them before they had entred the Port: But being entred into the Kings Chambers, they durft not assault them thereby they should have violated the League with Syphax. The like we read of the Venetians, who would not suffer the Grecians to injure the Turks in any Port belonging unto them.

But to return to what we have in hand, how far this licence of Murther, Spoil, and Rape, extends itself in the time of War will appear, in that Women and Infants are subject thereunto. I shall not hitherto refer the slaughter that the Israelites made of the Women and Children at Heshbon, Deut. 11. 34. Nor that which they were commanded to do against the Canaanites, and theirAssociates, the Amalakites; whereof Josphus (speaking of the Acts of Saul) writes thus, He proceeded even to the slaughter of Women and Children, accounting nothing therein too cruel or inhumane: First, because they were Enemies; and Secondly, because it was done at the special command of God, whose Right over men is far greater and more unquestionable, than that which men claim to have over beasts, as we have elsewhere said. No, rather, that which comes nearer to teffify the manners and customes of the Nations as to this, is that of the Pfalmift, Blessed be he that taketh his chil- dren and caseth them against the stones: Agreeable to that of Homer,

Ilia corpora terrae

Infantum, seius dum concinit omnia Mavors.

When dreadful War, whole Nations doth lay waft,

Then Infants bodies' gainst the Earth are dafht.

And that also which Severus out of the fame Homer applied to the Britains,

Nec quitat abitut intra

Viserat Matris adhibet, fugiet crudelia fata.

Nor can the Babes unborn,

Escape Wars rage, being from their Mothers torn.

The Thracians of old having taken the City Mycaelas put all to the Sword, both Wo- men and Children, as Thucydides relates. So did the Macedonians when they took Thebes, as Arianus tells us. Thus did the Romans also when they had taken the City Iuriges in Spain, deftroy all without distinction of Age or Sex, as Appianus testifies. The like did Scipio when he took Numantia. The Emperor Iulian having taken by storm the City Maris- zelada, destroyed all, making no distinction of Age or Sex: Quicquid imperius repertis, po- teftavit interarmis abhijmispt: Whatsoever force found, was sacrificed by the Swords of the enraged. Germanicus Cesar is laid in Tacitus to depopulate all the Villages of the Marisi, a people of Germany, with Fire and Sword, so that neither Sex nor Age could find pity. And the Emperor Titus when he conquered the Jews, exposed their Women and Children to be devourd by Beasts in their publick shews, and yet were neither of these two Princes e-

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To kill Men in a solemn War, lawful.  

BOOK III.

fled to be of a fierce and cruel nature, but were only carried away with the custumes of those times: No marvel then, if old men did sometimes undergo the same fate, as Priamus did who was killed by Pyrrhus.

Neither were Captives exempted from the rage of the Conquerours: when El'hos the Prophet had led the Syrians blindfold to the Gates of Samaria, as Josephus relates the story, King Joram demanded of the Prophet whether he should kill them; but the Prophet answered, that it was not lawful for the King to do, Salus enim Bello superat hostis occidit fasci; For those Enemies only may be lawfully killed that are taken in War. Pyrrhus in Seneca according to the custome of the Nations then in use, pleads thus,

\[ \text{Lex nulla capto parcit aut punam impedit.} \]

Neither doth this licence extend to Men only, but even to Women if taken in War, according to that of Scylla, concerning a Woman taken Prisoner:

\[ \text{At Belli saltem captivam lege necasses.} \]

To the same purpose is that of Seneca before quoted to be understood; for it was spoken of Polyxena, who being taken Captive might have been slain: yet is the advice of Horace to be preferred,

\[ \text{Vendere cum possis captivum, occidere non.} \]

Kill not thy slave, in case thou canst him fell.

Wherein he takes it as granted, that kill him he might, though to sell him were better; hence it is, that they are called servants, because they are saved alive, whereas by the Law of Arms they might have been killed: thus were all the Captives taken in Epiphanium put to death by the Corcyreans, as Thucydides relates; and seventy thousand Sionavians we read of that were put to the Sword by the Emperor Otto, and of five thousand Captives that were at once put to death by Hannibal. And Hiero in his African War, brings in a Cæfarican Captain giving thanks unto Scipio for sparing his life in these words, Tibi gratias ago, quod mihi vitam incoluimus atque bellum curae capto polliceris; I thank thee noble Scipio, for that being thy slave, thou art pleased to engage thy word for my life and safety. Neither is this licence of killing our Captives confined to any space of time; although by Municipal Laws it be restrained in some places more, in some les.

No nor Suppliants as we are instructed by many examples in all Histories; as namely, by the example of Achilles in Homer, of Mago and Taruntus in Virgilius: which do therefore stand upon record, to justify the like practice hereafter by the Right of War: For St. Augustine himself commending the Goths for sparing Suppliants, and such as fled unto Temples for protection, yet faith, That which by the Right of War they might do, they thought unlawful for them to do: Neither are they always received to mercy that beg it, witness the Grecians that sided with the Persians against Alexander, at that great Battel fought at the River Granium. And the Ulpenes in Tacitus, Who craving leave but to depart their City with their Bodies free, were rejected by the Conquerours, because it would have been thought cruelty to have killed them in cold blood after they had yielded themselves, and hard to keep a Guard upon so great a multitude, therefore they chose rather to let them perish by the Sword according to the Law of Arms. Observe here also the Right of War.

Neither do they always find mercy that surrender themselves without any condition at all, but even these are sometimes put to death, as the Princes of Pomeria were by the Romans, the Samnits by Sylla, the Numidians, ye, and Vercingetorix himself by Cesar: Nay, it was almost the perpetual practice of the Roman Generals upon the days of their Triumph, to put to death all the Captains and other Commanders (whether they were taken Prisoners during the War, or had yielded themselves) as Cicero in forms us in his fifth Oration against Perros; which, both Livy and Tacitus confirm: Nay, the same Tacitus records it of Galba, That he caufed the tenth Man to be killed of thofe, whom upon submilion he had received to mercy. And Cæcina upon the surrender of Aventicum, caufed Julius Alpinus to be put to death, as being the principal inftigator of the War; but the reft of the Citizens he left to, either the mercy, or the feverity of Vitellius.
It is the usual custom of Historians to ascribe the cause of this cruelty and outrage against Captives, or Suppliant; either to the like cruelty done by them unto others, or to their obstinacy in resisting them: But these are rather pretences than just causes; for Retaliation (properly so called) is not to be executed, but upon the same persons that offended (as hath been already said, where we discourse concerning the Communication of Punishments.) But contrariwise in War, this Right of Retaliation is often exercised on those, who were in no measure guilty of the crime, for which they are said to be punished. This custom is thus described by Diiodorus Siculus, The chance of War being on both sides equal, neither party can be ignorant of this: that in case they be vanquished, what they intended to do against their Enemies they had been Victors, that they must be contented to suffer from them. Thus did Philomelus the Phocian General persuade his Enemies to refrain from a proud and insolent revenge, by threatening to exact the like in case the Victory fell on his side. But as to the other pretence which is usually pleaded, namely, an obstinate endeavour to defend their own party; it is far from being punishable as a crime (as the Neoplatonists alluded to Belisarius in Prosopius) that according to the Ancient Roman Discipline, it was ever accounted a capital crime to do otherwise, especially if we were engaged therein, either by some natural obligation, or by an honest and deliberate choice; for in these cases they seldom admitted of any excuse, were the fear or danger never so great, Præsidio deedere apud Romanos capitale esset; To desist a Garrison, faith Livy, was ever accounted among the Romans a capital crime. Every man therefore may make use of this rigour and severity, so far as he thinks it may conduces to his own advantage, and is therein justified before men, by that common right and licence of Nations, whereof we here treat. This right or licence doth sometimes extend it self to hostages; and that not only to those who voluntarily give themselves as Pledges for the performance of Articles agreed upon, but unto those also who are delivered up by the former, which by the latter are tolerated. For if we respect the Law of Nature only, if a man have deferred to be put to death, it matters not much whether it be by the Sword or by Poyson: by the Law of Nature, I say, though otherwise it be far more noble to in- vade another mans life, as to give him an equal power to defend himself. But this is not due unto every man that hath deferred to dye, but by the Law of Nations, (if not of all, yet of the greater and better part of them) it is not lawful to take away the life, no not of an Enemy, by poyson; which Custom was introduced for a general good, left dangers, which are too rife and frequent in War, should be beyond all measure multiplied. And very probable it is that this Law was first enacted by Kings and Emperours, wholes lives, as they are principally guarded by Arms, so are they most easily endangered by poyson, were it not for the severity of the Laws, and the fear of infamy. This Livy calls a clandestine villany, speaking of Poyson. And Claudian, concerning the design of Pyrobus's Physician, who offered Fabritius to poyson him, calls it a detestable act, not fit to be spoken; so doth Odero, glancing at the same Story: which offer of the Physician, the Consuls not only rejected, but discovered unto Pyrobus; not so much for his fake, as to prevent the reproach and scandal that might enufe to themselves, left it should be said of them, That whom they could not conquer by true valour, they had by treachery destroy'd. Or as Anax Gelius recites the Epistle of the Consuls out of Claudian Quadrarvarius, communis exempti & fideis ego, vossum etsi; We think it not fit for common examples, and our own honour's sake, to admit of so great a wickednes. For as Valerius Maximus well observes, Armis Bellarum, non Venenis gere debet; Wars should be waged by Arms, and not by Poyson. Infomuch that when the Prince of the Cats made offer to poyson Arminius, Tiberius rejected it, therein equaling himself in honour to the old Roman Emperours. They therefore that hold it lawful to destroy an Enemy by poyson, as Baldus by the authority of Vettius did, do regard the mere Law of Nature, but overlook that Law which is established by the voluntary consent of Nations. Somewhat different from this manner of poysoning (because it hath somethings of force in it) is the anointing the Heads of Spears with poyson, thereby to enforce death upon a double account; which, as Ovid records, was much in use among the Getae. The like tellimony doth Pliny give of the Scythians, For they anoint their Arrows, faith he, with poyson, compounded of the purifed Gore of Vipers, and humane blood; immedicabile id fecus, a mischief incurable, because it made every flught hurt mortal. Lucan tells the fame of the of Rhodagins, s. 10. 23. See Ovid, Annu. upon Plin. l. 11. s. 53.

XIII. This right not to be referred to othercauses.


Lib. 42. Offic. l.c. 3. Plat. vit. Tyr. thei.

Lib. 3. 8. Lib. 5. 5. Arist. Politics 3.

XVI. As also by impoysoning Waters or Weapons. How this was prepared, we may learn out of Rhodagins, s. 10. 23. See Ovid, Anna. upon Plin. l. 11. s. 53.

Parniars;
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To an plain Viriatus, a hath or cafe, it being yea That or fuch like. He And o otherwile as attempt For at temp

But it is otherwife where waters are (without poiyfon) fo corrupted, that they cannot be drunk; as by throwing Carrion into them, and dead Bodies, or abdatis, which Belfarius made uze of in the Siege of A"mumin; or Lime, which the Turks did at Debibrat, or fuch like. For this was approved of by Solon, the Ambition, and others, againf the Barbarians; and as Oppianus records, was ufuallly done in his Age: it being no more than if the Current of a River, or the Veins of Water that feed a Well, should be cut off or turned in some other way, which by the Law of Nature and the general confeft of Nations are held lawful.

But whether the Law of Nations do juftifie the killing of an Enemy privately, that is, by sending one purposely to kill him in his own Quarters, is often questioned. For the refolving of which doubt, we muft diflinguifh of the perfons fent: for in cafe he be fuch a one as hath any ways given his faith, either expreffly or tacitly, unto him whole life he attempts; as if he be a Subject that shall be hired to kill his Sovereign, a Vaffal his Lord, or a Souther his General, or if he be received by him in protection as a Suppliant, a Stranger, or a Renegade; yea, if the perfor fent owe any faith to him whom he is fent to kill; then the Law of Nations doth not only condemn the perfor that is the infrument for his treachery and perfidouisnefs, but thofe alfo that make ufe of him. For although in other matters he that makes ufe of wicked instruments, though againft an enemy, may be found guilty before God; yet is he not fo before man. For he is not thereby laid to violate the Law of Nations, becaufe in this Cafe, more Leges perduraverunt in potestatim fium; Custom hath prevailed above the Laws. Et decipere, pr moribus temporum, prudentia elil:

Lib. 8. Epiffed Raffianum.

And to deceave (as Pliny faith) if it accord with the manners and custom of the Age we live in, is not a crime, but a Vertue; no knavery, but commendable policy. Yet doth not this custom extend it elf fo far as to the killing of an enemy: For he that shall make ufe of another mans treachery in that cafe, doth not only fin againft the Law of Nature, but of Nations. This is plain by what Alexander wrote to Darius, Impia Bella Jfficiptis, et cum habebis Armam, liceat minimi hostium capita; It is an impious War that ye wage againft me; for having Weapons to fight, ye chufe rather to purchafe with money the lives of your enemies.

And presently after he complains, That they did not obferve the Law of Arms. And in another place, I ought to perfecute him even unto death, not as an open Enemy, but as a secret Murthener. Hither we may refer that of Livy concerning Perjus, of whom he complains, That he waged not a juff and open war with a mind becoming a Prince, but that he used all manner of base and clandestine ways to defray his Enemies, like a Thief or a Poiyoner. All which, how odious they are to the Gods themfelves, would at length be feen by the event of his Fortunes. Agreeable hereunto is that of Varro maximus concerning the murder of Viriatus, which gave occafion to a double accufation of perfidiousnefs, the one by his friends, by whose hands he was killed; the other in Quintus Servius Cepio the Conful, who by encouraging them to do it by his promise of impunity, became himself the Author of the faid, and did therefore juftly lose the glory of the Victory. For Victoriam non meruit, fed emitt; He deferves not the honour of a Triumph that buys the Victory. Wherefore when the Murtheners demanded the reward promifed them by the Conful Cepio, it was anfwered, That it was never thought a meritorious act by the Romans for Souldiers to kill their General, as Eutropius testifies. Now the reafon why the Law of Nations, that allows us to make ufe of the treachery of others in all other cafes, doth not allow of it in this cafe, is the very fame that was before given in the cafe of poiyfon; namely, To refrain the dangers that attended Kings and Princes. When one told Eumenes, That his Enemies had hired one to kill him, He wouldnot believe that any General or inferior Captain would give fo ill an example againft himfelf. And in another place the fame Eutropius declares, That when Belfus had killed King Darius, it was not to be endured for examples fake; because it was the common cause of all Kings. For as Seneca well obferves,
Regi tuae atque maxime Regum fals.

A Kings chief care is the defence of Kings.

In a solemn War, and amongst those who have a right to denounce a solemn War, it is not lawful by the Law of Nations privately to kill an Enemy; but where there is no solemn War, it is by the same Law of Nations accounted lawful, that is, unpunishable. Tacitus denies peremptorily, That the Plot that was laid against the life of Gammanus, was at all, degenerate; because he was a Traitor. And Curtius was of opinion, That the guilt of Belfus in killing Dorius, did make the treachery of Spittaner appear the les odious; for that nothing could be thought wicked that was done against a Regicide. So likewise Ammiannus concerning Florentius and Barbalba, who had surprized Procopius the Traitor, Si Principem legitionem prediscenti, vel sips Jufitionis fore easi pronunciaret; si rebellion & oppugnatio intra quietis, ut serebatur, amplitas e memorabilis falsi opportunitas defterri mercedes: If it had been their lawful Sovereign that they had betrayed, the Laws had justly sentenced them to death; but if be were a Rebel, or a Disturber of the peace of his own Country, (as was said) ye ought to give him a reward worthy of so memorable a fault. Thus is Arbainius highly commended in Procopius for killing Gotharidus, as we may read at the latter end of the second of his Vandal History. So perfidiousnes or treachery against Thieves and Pyrates, though it be not altogether blameless; yet is it not by the Law of Nations punishable, becaus committed against such as are Enemies to humane Society.

But what if they, that are sent to kill an enemy privately, do owe him no faith, nor are any ways obliged unto him? Surely then by the Law of Nations it is lawful for them to kill him if they can, even in his own Quarters. Thus Pipen, Father to Charles the Great of France, attended with one only of his Guard, pall'd the Rhine, and killed his enemy even in his own Chamber. The like was attempted by one Theodorus an Etolian upon Silmone King of Egypt, which Polybius commends as no unmanly attempt. Such also was that Heroick enterprize of Q. Matius Secuola, who was in Plutarch's eyes, Aman accomplished with all vervous endowments, which attempt he thus defends, Hofes hoffen occider eunum; I being an Enemy would have killed an Enemy. Porfenna himself acknowledged this to be an act of true valour. Valerius Maximus commends it for a brave and gallant resolution. So doth Cicero in his Oration for Publius Securus; because to kill an Enemy wherever we find him, is lawful both by the Laws of Nature and Nations; neither doth it make any difference, how many they are that either thus act or suffer. Six hundred Lacedemonians we read of that with Leonidas their King, marched directly through the Camp of five hundred thousand of their Enemies, even unto the Kings Pavillion; the fame may be done by fewer. A reward was promised by the Empeor Valens to him that should bring in the head of any Scythan, whereupon a Peace immediately ensued. They were not many that circumvented Marcellus and his fellow Conful and flew them, and that had likely to have killed Peritius Cerealis even in his Bed. Ambrose highly commends Eleazar, who seeing a mighty Elephant higher than all the rest, assaulted it, fapping that he that fate upon him had been the King. Not much unlike was that attempt that Theodoreus made upon Eugenius, recorded by Zozimus. Nor that of the ten Persians against the Empeor Julian attested by Ammianus. Neither are they then that make these attempts excusable by the Law of Nations, but they also that imply them. Those Roman Senators that were so renowned for their Wars, were reputed the Authors of that galliant attempt made by Secuola. Neither is it to the purpose to object, that such men being taken are put to exeutive torments; for this happens, not for that they violate the Law of Nations, but because by the Law of Nations, every thing that is done against an Enemy; and all Conquerours are more or less severe, according as it shall conducde to their future advantage, for thus are spies dealt withal; yet notwithstanding, it is held lawful by the general consent of Nations, to send out such, as Mesis did Tofina into the land of Cusian. It is the custom of all Nations to kill spies, faith Appian, and that jollyfmes by such as have apparently a jull Caufe to make War; but by others, it is only lawful by that licence which the Law of Arms sometimes gives: But if there be any that will not make use of such instruments, though offered, this proceeds rather from the Magnanimity, and the confidence of him that makes the War in his own strength, than from an opinion he hath that by the Law of Nations it is unjust.

The ravishing of Women is by the Law of Nations sometimes permitted in War, and sometimes forbidden. They that permit it do respect only the injury done to the body of an Enemy, which by the Law of Arms they think ought to be subject to the Will of the Conqueror: But others much better, look not unto the sole injury done unto the body of an Enemy, but to the very unbridled act of Luft, which conduceth nothing either to the security of the Conqueror, or to the punishment of the Enemy; and therefore
fore should be no more unpunishable in War, than in Peace, and this is the Law if not of all Nations, yet at least of the better and more civilized amongst them. Marcellus before he took Syracuse took special care of the preservation of the Chastity, even of his Enemies. And Scipio (as Livy testifies) told his Souldiers, That it much concerned his own honour, and the honour of the people of Rome, That nothing that was any where, (that is among such Nations as were civilized) reputed sacred, should be by them profaned or violated. Dionysius Sicilis complains against Agathocles his Souldiers, That they abstained not from that foul sin of ravishment. The like doth Appian in his Mithridatick War, concerning the Captives taken in Chios, That both Women and Children were barbarously ravished by those that led them away prisoners. Aesop speaking of the infelocities of the Sicilynians, being Conquerours in ravishing the Pellenean Virgins, and Matrons cry out thus, These by the Gods of Greece are such acts of cruelty and inhumanity, as were never to my remembrance, allowed of by the very Barbarians. And surely it is but reasonable, that this should be generally observed among the Christian, not only as a part of our Military Discipline, but as a part of the Law of Nations: namely, That he that shall forcibly abuse a Woman, though in the War, shall every where be punishable. Belshazzar always observed this Rule: So did Totilas when he had taken Cnna, and at Rome also, as Procopius leaves it upon Record. Neither did the Hebrew Law suffer this wickedness to go unpunished, as may be collected from that part of it, which so provides for a Virgin taken Captive, That he that takes her might marry her, and if afterwards he liked her not, he might dismiss her, but not sell her: Thou shalt not take money for her, because thou hast defiled her, faith the Law, Deut. 21. 12. Upon which words one of the Hebrew Doctors thus glosseth, God would have the Camp of Israel to be holy, and not like the Camp of the Gentiles, polluted with Whoredom, and such like abominations. Tertullian likewise highly extolls the Jewish Law for its care of prisoners taken in the War, to preserve them from shame and reproach, especially of women. Arrianus highly commends that fact of Alexander, who being taken with Roxana's beauty, refused to abuse her as his Captive, but did her the honour to marry her: So doth Plutarch also, He disdained to force her as a Conqueror, but wedded her as a Philosopher. The fame Plutarch relates it of one Torquatus, That he was banished by the Romans into the Isle of Corsica, for forcing a Virgin whom he had taken Captive: But CarGoes King of Persia was more severe, for he caused one that had ravished a young Maid to be Crucified; as Procopius informs us in the second of his Persian Wars.
CHAP. V.

Of Spoil and Rapine committed in War.

I. That the Goods of an Enemy may be spoiled or taken away.

II. That things that are sacred, which how to be understood.

III. That the Goods that are Religious, where some caution is added.

IV. How far forth fraud may be used in this case.

Cicero in the third of his Offices gives this Rule, Non est contra naturam spoliare eum, quem honossum est necare; It is no whit repugnant to the Law of Nature, to spoil and plunder him, whom it is lawfull to kill. It is not then to be wondered at, that the Law of Nations permits the spoil and devastation of an Enemies Land and Goods, feeling that it permits him to be killed. Polybius tells us*, That by the Right of War, it is lawfull either to take away or to destroy the Forts, Ports, Cities, Subjects, Ships; Corn, Cattle, and such-like things of an Enemy. And in Livy we read, That there are certain Rights in War, which as we may safely do into an Enemy, so we must with patience suffer from them; such as the burning of our Corn, the pulling down of our Houses, the taking away of our Men and Beasts. He that is vers'd in Histories, will find almost every page filled with these dreadful effects of War, the demollishing of Cities, the razing and throwing down their Walls, the spoiling and laying waste of the Enemies Country with Fire and Sword; yea, and we may observe, That all these are lawfull to be done, though the Enemy do voluntarily surrender themselves. The Townsmen, faith Tacitus, set open their Gates of their own accord, and submitted themselves, and all they had to the Romans, whereby they saved themselves: But the Romans burned the City Artaxata and laid it level with the ground, because they could neither keep it with safety, nor leave it with honour.

Neither are things sacred, that is, consecrated to any one or more Gods, excepted from these Out-rages of War, meere ly the Law of Nations, setting aside the consideration of other Duties: for, Cum loca capta sunt ab hostibus, omnia defunt eis sacra; As soon as any place is taken from the Enemy, every thing in it is consecrated, is sacred, faith Pomponius. And to faith Cicero, Sacra Syracusarum victoria profana secerat, The victuory made all the sacred things in Syracuse profane. Tertullian in his Apologetics confesseth, That War and Victories cannot consist without the Subversion of Cities; which also cannot happen without some injury done to their iner Gods. For Temples under the same fate that their Cities do, and their Princes have an equal share in publick Calamities as other Citizens; neither do their consecrated festivals escape better than their profane. Tot Sacrilegia Romanorum, quart Trophæa; tot de diis, qua de gentibus triumphi: Look how many Victories the Romans had, so many Sacrileges they committed: and as often as they conquered their Enemies, they spoil'd and rifed their Gods. The cause whereof is this, because those things which are laid to be sacred, are not in truth exempted from humane ills, but are made publick, as Marbillus Patavinius observes in his Defence of Peace: But they are called Sacred, from the end whereunto they are defin'd, which appears by this, That when any People give themselves up to another People, or to any King, they deliver up that also which is called Sacred; as is manifest by the usual form in Livy, We the People of Campania, do deliver up into your Power and Poffeflion, O Father, our Corn, our Houses, the Temples of our Gods, together with all that we have whether Human or Divine: (the like we read in Plautus his Amphitryo.) And therefore as Uplian concludes, There is a publick Right even in things that are Sacred. And Panfanius tells us, That it was a Cufom common as well with the Grecians as Barbarians, that things Sacred should be disbop'd of, at the Will and Pleasure of the Conquerour. So when Troy was taken, the Image of Jupiter Hercules was given to Sthenelus, and many other Examples he there brings. And Thucydides confirms this, saying, That it was a Law among the Grecians, that look whose the Empire was of any City or Countrey, whether great or small, theirs also were the Temples: Wherewith accords that of Tacitus, where he faith, That all the Temples, Temples and Images, that were in any of the Cities of Italy, were at the disposal, and under the jurisdiction of the Romans. Wherefore it is plain, That the People themselves changing their minds, may make any thing profane that was holy; and this is not obfuscely proved by those great Lawyers Paulus and Venedictus. We may also observe, That in times of War, and in cafes of necessity, those things which have been consecrated, have by those that consecrated them been converted to ills of War; as was done by the Syracusians in the time of Timoleon, as Plutarch testifies. So the Chis raised the tribute imposed on them by Mithridates by the sale of the consecrated Veilis.
Vessels of the Temple, as Appian testifies. Pliny speaking of Portius Cato tells us, That he suffered the consecrated Trees and Graves to be cut down, having first offered sacrifices, Sulphur in his War against Mithridates rob'd the Temple at Delphi of those rich Precincts, sent thither by Olympia and Epidaurus, as it is flored in Plutarch; the just price whereof he afterwards restor'd, as Diodorus informs us. Augurius we read borrow'd all the Treasures of the Temple in a time of necrcity, as Appian writes. And Aratus pownd all the Consecrated Vessels, as Ctesiodore relates. The Emperor Heracleus in his great necrcity, turn'd all the Vessels of the Church into Money, the price whereof he afterwards restor'd, as Theophanes writes. The like was done by Pericles, but with a promis of restitution; by Magus in Spain, by the Romans in their War against Mithridates, by Sulba, Pompey, Cesar, and many others. There is nothing so Sacred, so Holy, as those things that are Consecrated to the Worship of the Gods, faith Tiberius Gracchus in Plutarch: And yet there is none that can hinder the people from using them, or removing them as they please. Our Churchers, faith Seneca, are sometimes spoiled for the defence of the publick, and what was given to the Gods, we often take to pay our Souldiers. Whence Servius upon Virgil tells us, That whatsoever is given to the Gods is so long holy, as it continues unprofan'd. And therefore Trebatius the Lawyer in Sefar's time faith, That is paid to be profane, which is taken from an Holy and Religious use, and converted to the use of private men. Thus Germanicus having conquer'd the Marfians deftoy'd all things both Sacred and Profane, levelling with the ground that Temple so famous among those Nations called Tufcane, as Tacitus relates it. It is acknowledged by Panymat, That whatsoever was Consecrated to the Gods, was lawful prize to the Conquerour. And Cicero speaking of Publius Servilius faith, That the Images, and other Ornaments of the Enemies Cities, which by force and violence he had conquer'd, He by the Law of Arms, and by the Right of Conquest took and carried away. So Plutarch speaking of Fabius, faith, That the Image of Hercules which he took at Tarentum, he fent to be placed in the Capitol at Rome, leaving the reft of their Gods as enraged against the Tarentines. So alfo Livy concerning the Ornaments taken out of the Temples at Sardice by Marcellus, and brought to Rome, faith, That they were Parta fere Belli, Got by the Right of War. Thus Fabius alfo in his Oration, calls the spoilings of Temples, the Rights of War. The like we read in Sallift of Cato, who recounting the miferies that then fell, and the Conquerour, brings in this amongst others, the robbing of their Churches. But yet in cale it be believed, That there is any thing of a Deity in this or that Image, then to break it, to spoil or deftroy it, is in them that are of that perfwaion, great impety. And upon this prefumption, that both Parties agree in this belief, it is, That they that commit fuch robberies, are of ten branded with impety, and accuf'd for violatig the Law of Nations. But in cale the Enemy be of another perfwaion, then it is otherwife. As to the Jews it was not only permitted but command'd, That they should utterly abolish the Idol's of the Gentiles, but that they should not affume them to themselves: the reafon was, to inftil in them the greater defterination of their superflitions, by begetting this conceit in them, That the very touching of them was not without pollution; and not that what was consecrated to strange Gods was to be feared, as Sophus seems to expound it, therein doubting flattering the Romans no lefs, than in the Exposition of another Precept, namely, of not naming the Gods of the Gentiles, which he fo interprets, as if it were therefore prohib'd to name them left they fould reproach them: whereas their Law did expressly forbid to name them with any Honour or Reverence, nay, without fome fhew of defterination. For the Hebrews moft affuredly knew, that in thofe Images there was nothing Sacred, neither Angel, nor Spirit, nor any virtue of the Stars, as the Gentiles dream'd, unlefs they were fuch Evil Spirits as are ufually deftructive to Mankind. And therefore as Tacitus rightly obferved, in his description of the Manners and Infititutes of the Jews, Prefana illis omnim, que aedica non sacra; All things that are holy to us, are unto them profane. It is no wonder then, that we read of fo many Idol Temples burnt by the Macchabees, 1 Macc. 5. and 10.

When he demolish'd all the Idols of the Grecians, did nothing contrary to the Law of Nations, though all their Historians did bitterly inveigh against him. For the Perfians could not believe, that there was any Divinity in them, because they adore the Sun only as God, and the fire as a Spark or ray of the Deity; and therefore as Diogenes Laertius tells us, did their .Alpha, ahbor Images. By the Hebrew Law, None may enter into the Temple but the Priests only; yet Pompey the Great enter'd into it by the Right of

Xerxes
of a Conqueror, as Tacitus thought: Or, as St. Augulfine relates it, Non devotione sus
plicis; sed jure Victoris; Not as a Suppliant, but as a Victor. He did well to spare the
Temple, and to refrain his Souldiers from the pillage of it, though, as Cicero wisely
conjectured, it was more out of flame, and to avoid scandal, than out of any true pic-

ty; but he did ill in entreing thereunto in contempt of the True God, for which the Pro-

phets did so bitterly inveigh against the Chaldeans, and for which cause it was so or-
dered by the Divine Providence, That Pompey should afterward be killed at Caffium a
Promontory in Egypt, as it were, in the light of thofe Jews, whose Temple he had
so profaned. But yet, if we regard the Opinion of the Romans, there was nothing
done by Pompey that was contrary to the Law of Nations. So when Josephus had decla-
red the dejluction of the fame Temple by Titus, he likewise adds, That it was done by
the Right of War.

What hath been said of things Sacred, may also be said of things Religious. For
these are not fuch as belong to the dead, but to the living, whether of some People, or
of some Families: Wherefore as Pomponius well observes, as places being taken by the
Enemy, though holy; fo whatsoever is Religious in thofe places cafheth to be fo after
the victory. Sepulchra hofium religiofa nobis non sunt, idoque lapides inde sublatos in quem-
libet ufium convertere possumus; The Sepulchres of our Enemies are not unto us Religious,
faith Paulus the Lawyer; and therefore we may take away the flones, and convert them
with caution to the dead.

This alfo we must here repeat, That the Goods of our Enemies may be taken away
from them, not only by plain force, but even by fraud alfo; fo it be without perfidi-
ones; nay, we may by the Law of Nations be permitted to excite the treachery of
others; (that is to fay) the faid Law of Nations begins fo to convice at fuch petty and or-
dinary flips, as the Civil Law doth at whoredom, and griping ufury.
CHAP. VI.

Of the Right to things taken in War

I. What the Law of Nature is, concerning things gained by War.
II. What the Law of Nations ordains.
III. When things moveable are said to be taken by the Law of Nations.
IV. When Lands are said to be acquired.
V. Things being not the Enemies, are not acquired by War.
VI. What the Law of Nations determines concerning goods taken in an Enemy's Ship:
VII. By what Law we get from Enemies, though by them taken from others, is lawful prize.
VIII. That it is not altogether true, that things taken from an Enemy, are theirs that take them.
IX. That naturally, both possession and dominion may be acquired by another.
X. The definition of publick and private acts done in War.
XI. That Land may be gained, either to the people, or to him that maintains the War.
XII. That things moving themselves or moveable, being taken by a private act, become any mans that takes them:
XIII. Unless the Civil Law do otherwise determine.
XIV. That things taken by a publick act, are either the peoples, or his who maintains the War.

Besides the licence that a just War gives to commit such acts against men, whereof we have treated hitherto; there is also another effect, which by the Law of Nations is proper to a feque War. And indeed, even by the Law of Nature, those things may be acquired by a just War, which are, either equivalent to that ², which though due, cannot otherwise be obtained; or which cause them to suffer who have done wrong, so as it exceeds not the bounds of a just punishment. By virtue of this Right of acquiring things by a just War, Abraham offered unto God the tenth of the spoil he got from the five Kings, as the Author to the Hebrews seems to expound the story ³. So also did the Grecians, the Carthaginians, and the Romans unto their Gods; as to Apollo, to Hercules, to Jupiter Feretris, and others. The Patriarch Jacob leaving to Joseph an especial Legacy above his Brethren, faith, Lo I give thee one part above thy Brothers, which I took from the Amorites with my Sword and with my Bow: where the word, cepi, I took, seems to be Prophetically spoken for, certo capiam, I shall freely take, (for lo the Chaldean Paraphrast expounds it, as if it had already been done by Jacob's Prayers to God, who by his special favour preserved Sichem for Jacob and his Possibility.) Where note also, that that is attributed unto Jacob which was done afterwards by his Polliter, who were called by his name, as if he and they were but one and the same person; which place is better thus expounded, than to wrest it (as the Hebrews do) to the spoil taken from the Sichmites, which was long before done by the Sons of Jacob. For that, as being somewhat perfidiously done, the old Patriarch did confcienciously disclaim, as may be yet seen upon record, Gen. 34. 30. and Gen. 49. 6. Now that this Right, which Abraham and others had unto the spoils taken in a just War, was approved of by God, so long as it was limited within the natural bounds prifibed, will appear, not by this only, but by other the like places of the Scripture. God in the Law which he gives, Deut. 20. 14. concerning that City that should refuse to surrender, but was afterwards taken by the Sword, orders thus, Thou shalt take the spoil of it to thy self, and thou shalt enjoy the prey of thine Enemies which the Lord hath given thee. Again, The Rubenites, the Gadites, and a part of the Tribe of Manasses, are said to have conquered the Inrues, and their Neighbours, and to have taken much spoil from them; this being given as the reason, because in the fight they called
II.

conquered

to

Which

Thus

Whereunto which

Amalekites, Etnans, and the Gadites, in their prosperous successes, faith, Divide the spoil of your Enemies with your Brethren, Josh. 22. 8. And when David sent to the Elders of Israel the spoil taken from the Amalekites, he gave this honourable Character of it, That it was a present sent them out of the spoil of the Enemies of the Lord. And no marvel; for, as Seneca obtestis, To enrich any man with the spoil of an Enemy is honourable. There are also certain Divine Laws extant concerning the dividing of such spoils, as Num. 31. 27. And Philo the Jew reckons it among the Curves of the Law, That their fields should be reaped by their Enemies, whereby must necessarily ensue, Famine to themselves and Plenty to their Enemies: Whereunto we may add, That God gave the spoil of Tyre to Nebuchadnezzar for the pay of his Army, Ezch. 29. 19, 20. because that by him God punished the Pride of the Tyrians for infulting over Jerusalem, Ezch. 26. 2.

Moreover by the Law of Nations, not only he that makes War for a just cause, but every man in a solemn War, is without either end or measure owner of whatsoever he can take from an Enemy; namely, that he that, and whosoever claims from him, are to be defended in their possessions of the things so gained by all Nations: which, according to the external effects thereof may be called Dominion. This, faith Xenophon, is an everlasting Law with all men, that a City being taken by force, all the goods and riches are the Conquerors. Plato likewise was of the fame opinion, All that was the Conquered become after the Victory, the Conquerors. And elsewhere amongst divers kinds of national acquisitions, he placeth this also which he calls sometimes Polemical, sometimes Predictory, and sometimes Certatory: Therein agreeing with Xenophon, who brings in Solon's divers interrogations drawing Euthydemus to this confession, That it was not at all times unjust to spoil and to destroy: as for example, when done against an Enemy. Aristeas in the first of his Politicks, faith, That the Law of Nations, as by an universal agreement had ordained, that whatsoever is conquered from an Enemy by War becomes immediately the Conquerors'. To the like purpose is that of Antiphanes, We ought to wish our Enemies abundance of riches without valor; for so those riches will quickly find other Masters, not those that possess them, but those that can conquer them. For as Plutarch observes in the life of Alexander, What was the vanquished, both in, and ought to be accounted the Conquerors'. And elsewhere the same Plutarch, The goods of those that are by War overthrown, are proposed as the reward of the victory; which are the very words of Xenophon, What is gained by Arms, faith Diogenes, or go by the right of War, ought not easily to be lost. Thus Philip in his Epistle to the Athenians, faith, All of us possess Cities, which were either left us by our Ancestors, or being subdued became ours by the right of War. Thus Scephiuses also, If by making War against us, thou hast subdued our City, thou mightest lawfully have possessed it by the Law of Arms. Maccellus in Livy justifies himself in taking the spoil of Syracuse by the Right of conquest. And the Goths in Agathias, do by the fame Law, justifie King Thedorick, who had first conquered Odoozer, saying, Quis ejus fuerat omnium numeri juare bellis, Whatsoever Odoacer had, Thedorick possess by the right of War. Thus the Roman Embassidors told Philip concerning the City of Thrace and some others, That if he had taken them Cities by War, they had been his by the Law of Arms, as being the reward of his victory. And thus Magianus pleads, saying, The land that his Father conquered by War from the Carthaginians, he held by the Law of Nations. So also Mithridates in Justine faith, That to please the Roman he had withdrawn his Son out of Cappadocia, which as a Conqueror he was rightly posses by of the Law of Nations. Cicero tells us that the City Mitylene became the Romans by the Right of War and by Conquest. And in another place he tells us, That propriety in some things may be gained either by preoccupancy, or by War, as in those things that are gained by Victory. Of the mind was Dion Cassius, All that was the Conqueror's immediately becomes the Conqueror. Quis ex hostibus capitatur quae gentium statum capiendum sunt; Whatsoever, faith Caesar the Lawyer, it taken from an Enemy by the Law of Nations, immediately is made his that takes it. And this kind of acquisition Theophrastes calls a natural possession. So likewise Aristeas, because it hath respect to no other cause than the bare fact it self; from whence arifeth a kind of natural Right, as the Dominion of all things at first began by Preoccupancy; an impression whereof, we have yet remaining in such Creatures as are naturally wild, whether they live on the Earth, in the Sea, or in the Air, which for the most part are theirs and that first take them. As those things also which are taken in War: Besides those things are presumed to be taken from an Enemy, that are taken from the Subjects of an Enemy: As Dercyllides in Xenophon argues, since Pharnabazus was an Enemy to the Lacedemonians, and Mada subject to Pharnabazus, therefore were the goods of Mada lawful prize by the Law of Nations. Moreover
Moreover, by the Law of Nations things are then said to be taken in War, when they are so detained from us that we are deprived of any probable hopes to recover them, and are no longer able to pursue them; as Pompeius determines the like Question. And this, in things movable, is to be premised as soon as they are carried into the Enemies Garrisons. A thing may be said to be lost in the same manner as it is said to return after it had been lost; but may be said to return as soon as it comes within the Bounds of the Empire from whence it was taken, that is, as soon as it comes within our Garrisons. Nay, Ruther the Lawyer doth plainly aver that man to be taken that is carried out of our Bounds. And Pompeius declares that man to be taken in War whom our Enemy, having apprehended from out of our Garrisons, had led into their own. For until he be secured within their Garrisons, he remains a Citizen or Subject of ours. Now by this Law of Nations there is the same reason for Goods as there is for Perfons, whereby we may easily conclude, That in some places things taken in War are presently said to be his, or theirs, that take them, that is, upon this condition, That they continue in their possiFion for such a time. Whence it seems to follow. That at Sea, Ships and other Goods are then said to be taken when they are carried into our Enemies Harbours, or to such a place where their whole Navy rides; for then their remains have no hopes of recovery. But by a later Law of Nations, especially of those of Europe, it is thus judged, namely, If the things taken continue in the possession of the Enemy twenty four hours, then are they accounted for lost.

But it is not so with Lands. For they are not said to be taken as soon as the enemy sets down upon them. For though it be true that that part of the Land which an enemy with a strong Army encamps upon, is by them for the present possess, as Celius observes; yet is it not every possession that is sufficient to alienate the Title of Land, but such a one as is firm and lasting. The Romans were so far from thinking that part of their Land lost, whercon Hannibal encamped, that at that very time they fold it for as much as it would have given before. But that Land only is said to be lost that is immured or secured with Walls, Forts, Rampires, and such like Monuments; that unless the enemy that holds them can be driven away, there can be no possible access unto it by the former Owners. And this derivation of the word Territory, which Siclus Placcus gives, namely, Aerarentus holbions, From deterring the enemy from approaching unto it, seems to be as probable as either that alligned by Varro, aerenda, from wearing; or that of Frontius. From the fort or earth; or that of Pompeius the Lawyer, From the power that the Magistrate of the place hath to affright all persons within those bounds by removing or driving them out of it. Thus Xenophon in his Book concerning Contribution faith, That the possession of Lands is held in the time of war by Monuments, which he there calls Walls and Frontier Garrisons.

Whence this also may be gathered, That before the War can transfer a Right unto us in any thing so taken, it is requisite by the Law of Nations, that that Right should first be in the Enemy. For things depoFited or laid up within our Enemies Towns or Garrisons, whose right Owners are neither Subjects to our Enemies, nor have any hostile mind towards us; cannot by War be made lawful prize, though we do conquer the place; as is sufficiently proved, among many others, by that of Ethiopia, where he flews. That Amphiloch, being a City belonging to the Athenians, could not be lawful prize to King Philip by that War which he made with the Amphipolitans. First, because no reason could be given why the Athenians should lose their right, being no Enemies at that time to King Philip; and then, Because this Right of changing properties by mere force would prove a matter of so dangerous a consequence, that it ought not to be largely interpreted.

Wherefore that which is commonly said, That Goods found in the Ships of our Enemies are adjudged to be the Enemies Goods, and consequently are lawful prize, is not so to be understood as though it were a certain Law made by the Right of Nations, but because it gives occasion to a very great presumption that they are so, which notwithstanding by pregnant and evident proofs to the contrary may be null'd. And fo it was long since adjudged in Holland in a full Senate, during the War with the Spaniards in the Year 1337, and from them hath since part into a Law. Neither are the Ships of our Confederates forfeit, though the Goods in them be an Enemies, unless it be so agreed with the consent of the Masters of the Ship. And so are the Laws of France, as I suppose, to be understood, which adjudge the Goods lawful prize, if the Ship be so; and the Ship lawful prize, if the Goods be so. But otherwise the Goods only are prize, but not the Ship. So in the War between the Venetians and the Genoese, the Ships of the Grecians being searched, those Enemies that lay hid in them were taken and made Prisoners.

This also is most certain, That if we look no farther than the Law of Nations, whatsoever is taken by War from our Enemies, cannot justly be claimed by those from whom those Enemies won it, by the Right of War: becaufe, The Law of Nations first made our Enemies Lords of it, (as to an external Right) and afterwards the same Law made it ours. Thus Zepherus pleads his Title against the Ammonites, becaufe the Land in question, as also another part of the Land of the Moabites were, by the right of Conquest first won from the
the Ammonites and so, invested in the Amorites; and from the Amorites, by the fame 
Right of War, was transferred unto the Philistines, Judg. 11. 23, 24, 27. Thus did David 
claim and divide as his own, the Lands that he took from the Amalekites, notwithstanding 
that the Amalekites had before taken it from the Philistines. Titus Largius (as Dionysius 
Halicarnassensis records the Story) did thus adjudge this Case in the Roman Senate, when 
the Volcians laid claim to some of those Lands which the Romans had then lately won 
by the Right of War, because anciently they had been Lords thereof, saying, We Romans do 
account the possession of those Lands which we have won by the Sword to be most just and honof; 
neither can we be so easily persuaded to erase the Monuments of our Ancefors, as by reftor-
ing that back unto them, when they had them not to keep them. Nay those Lands 
that we thus gain, we concede our felvks bound not only to communicate to those Citizens that are 
now living, but to leave to those who shall hereafter succeed us. So far are we from adjudging 
that against our felvks (by a voluntary surrender of what we have gained by the Sword) which is 
usually adjudged against Enemies. This Plutarch relates to be the ground of the War between 
the Romans and the Vejan, who demanded of the Romans the City Fidone, as anciently belonging 
unto them; which demand was not thought by the Romans to be unjust only, but ridiculous; to wit, 
that they would not aid and affift the Fidonites, whilst they were contending against the Ro-
mans, and in great danger; but suffered the Romans thereof to be destroyed, should now lay claim 
to their Houfes and Lands when the were poftefed by the Romans by the Right of Conquét. This alfo 
is plain by that Anfwcr which the Romans gave unto the Arnecis, We Romans do conceive that 
whatsoever any man wins by his valour from his Enemies, he may bequeath to his Foffery, 
or being by the beft of titles his own. So in another place they return this in anfwer to the 
Volcii, We account that which we conquer from our Enemies be the beft Earfe we have, seeing 
that this is not only adjudged ours by our own Laws, but by a title derived more truly from the gods 
than from men, and approved of by the confant practice of all Nations, both Greeks and Barbar-
ians; we shall not therefore yield up any thing cowardly of that which we have gotten by valour, 
or calmly forego what by the Sword we have gained. Maximum hoc probrum foret, quae 
virtute ac fortitudine quæfita sunt, ea per fomnium dum Ruporem amittere. For this 
would be the greateft diijlimour unto us, if either through fear or fuperfluity we should lofe that by 
which virtve and mere manhood we have acquired. And this is also confelt in that Anfwer of the 
Samnites, We have gained this by Conquef: t, which Law is of all acquisitions the juftell. By 
this Right the Romans held Syria, as Appianus notes, without refining it to Antiochus 
Pius, from whom Tiganes, that great enemy to the Romans, had formerly taken it; ad-
judging it more equal that Syria should be governed by the Romans, who bad expelled Tig-
annes; than by the Seleucidas, who had been ejected by Tiganes, Yea, and Antiochus himself was 
of opinion, That that was the moft just and lafting possession that was got by the sword. Jufline 
brings in Pompey anfwering the fame Antiochus (who, after the recfession of Tigranes into Ar-
menia, demanded the Kingdom of Syria, out of which he had been by the fame Tiganeus, 
draften, and into which after eighteen years he had been refcued by Lucullus) in fhefe words. 
That he would neither with nor without the corntent of the Syrians fet fuch a King over them as could 
be content to hide himself in a corner of Cilicia the whole that Tigranes held Syria. And 
now the fame Tigranes being vanquifhed by the Romans, would demand the reward due to other 
mens labours. And therefore as he had not taken the Kingdom from him, fo that Kingdom 
which himself had left unto Tigranes be refufed to give him, because he knew not how to defend it. 
So attefque parts of Gallia which the Cumbri took from the Gauls, the Romans afterwards 
taking, held as their own. Nor did the French reftore to the Romans that part of Italy 
which they took from the Goths.

But here a more knotty Quefition arifteth, concerning the perfons to whom the spoils 
taken from the enemy in a folemn War belong, whether to the State, or to every perfon 
of, or among the people. The Modern Lawyers do vary exceedingly in their opinions 
concerning this Point; for moft of them finding it in their Civil Law, That captis font ex 
prietiana, Things thus taken, are theirs that take them. And in the Body of the Canon 
Law, That the spoil is to be diftributed by publick Authority, do one from another (as is 
usual) deliver their opinions thus, That primarily, and by original Right, he that first appreh-
ends them hath the beft title to them; but notwithstanding that they are all to be brought 
to the General, who may dijtribute them amongft his Soldiers. But this opinion is not 
more common than false; and therefore that we may hereby learn how unsafe it is in fuch 
doubtful cafes to be biassed by fo weak an Authority, I fhall the more accurately confute 
this opinion. We cannot indeed deny but that by the confent of Nations this Quefion 
may be determined either way, namely, That the Spoil may belong either to the people, 
or to him that bears the charge of the War, or to thofe particular perfons that with the 
hazard of their lives do ftill lay hands on it. But the Quefion here is, Not what they 
may determine in this Point, but what they have or do determine of it; whereunto I an-
swer, That the things of an enemy, by the confent of Nations, are no otherwife their enemies that 
take them, than as they belong to none; as we have already explained it from that Saying of 
Nero to the Son.
Of the Right to things taken in a Just War.  

BOOK III.

IX.  

That possession and dominion may be gained for us by another.  

L. tacqua D. de aq. dom.  

But the things that are no Bodies, are indeed theirs that first take them. But they may be paid to them that employ others to take them, as well as they who take them for and by themselves. So they that are employed by others to catch Fish, Fowl, Deer, or Pearls, whether they be Children, Servants or Freeman, do not appropriate them unto themselves, but take them for those that employ them. It was well said of Modestinus the Lawyer, Whatever is naturally gained, as possession is, may be gained by any man whomsoever we will appoint to do it for us. So likewise Paulus the Lawyer, Possession is gained by the mind, and by the body, but then the mind must be our own; but the body may be either our own or another. And in another place, Possession may be taken for us by either a Proctor, an Attorney or Guardian; that is, if it be done by them with that mind and purpose as to make it ours, Thus it was among the Grecians, they that overcame in the Olympic Games, obtained indeed the prize; but not for themselves, but for those that lent them. And the reason is, because naturally one man may make use of another as his Instrument, if both are willing. Wherefore the difference that is said to be between persons bond and free, as concerning acquisitions, respects only the Civil Law, and appertains properly to civil acquisitions; as appears by that place of Modestinus before cited. And yet the Emperor Severus drew these nearer to the pattern of natural acquisitions, not only for profit, as out of Jurisprudence, but he himself acknowledged. Setting then aside the Civil Law, that lying will hold good, That what a man may do for himself by himself, that he may also do by another; and it is the same thing to do it by another, as to do it by himself.

Here then we must distinguish between those acts which in a War are truly publick, and those private acts that are done by the occasion of a publick War. By these private acts the Goods of an Enemy may primarily and directly belong to the private Souldier; but whatsoever is gained from an Enemy by such acts as are publick, is due to the people, or to him that maintains the War. Upon this Right of Nations Sicipo grounds his plea against Mopsippus in Livy, Syphax, by the good conduct of the Roman people, is conquered and taken; and therefore He, his wife, his kingdom, Lands, Towns, with their Inhabitants, yea and in a word, whatsoever Syphax had, is thereby become lawful prize to the people of Rome. And in the same manner doth Ammius the Great argue, That Callipus did of right belong to Seleucus, and not to Ptolomy; because it was Seleucus that maintained the War, to whom Ptolemy was but an Auxiliary, as Polybius relates.

The Soil, and whatsoever is fixed thereon, are not usually taken but by some publick Acts, as by the introducing of an Army, by placing of Garrisons in Strong Holds, Towns and Castles; and therefore, as Pomponius faith, Publicam aggressius ex Hostibus caput est; Lands taken from an Enemy fall to the State, that is, (as he expounds himself) prado non cedit, is part of the prey or booty strictly taken, (which is sometimes granted to the common Souldiers.) So Saamo in Procopius, That Prisoners and some other Moveables should be given as a prey to the Souldiers, is not without some reason, (as it is done by publick Grant, as we shall anon explain it;) but that the Lands should altogether belong to the Prince, or to the Roman Empire that defrays the charge of the Enemy, is but juj, though the Emperor Severus gave the very Lands conquered from his Enemies unto the Captains and Souldiers of his Frontier Garrisons. Among the Hebrews and Lacedemonians the Land taken by War was divided by Lots among the Tribes; yet so, that amongst the Hebrews the Kings Lot was equal to that of each single Tribe. Among the Romans, the Lands taken in War were either kept to be let out, some small portion thereof being sometimes left for honours fake to the former Owners; or alienated and sold, or alligned over to Husbandmen to be ploughed or made tributary, whereof we have divers testimonies in their Histories, Laws and Commentaries. The Romans, (as Appian tells us) when they subdued Italy, took away part of their Fields by way of punishment. And elsewhere he tells us, That the Romans having conquered their Enemies did not take away all their Lands but a part only. Cicero also in that Oration that he made to the Chief Priests for his own house, notes, That their Emperours having subdued an Enemies Country, did sometimes confecrate their Fields, but it was always by the Decree of the people.

But as to things moving themselves or moveable, they are taken either in publick service, or out of it. If they are such as are not taken upon publick Duty, they are theirs that take them. And hither we may refer that of Celius, Que res habiles apud nos sunt, non publices, sed occupantium sunt; Whatsoever is found amongst us that was the enemies, belongs not to the Commonwealth, but to them that apprehend them; that is, the War being begun. For the very fame was observed even of Men and Women at such time as they in this case were equally valued with Goods. We have a notable Saying in Tryphonius to this purpose, But they who in times of peace come to sojourn in another dominions (as friends) the War suddenly breaking out, were made Slaves with them amongst whom they were by their own hard fate apprehended as enemies. Where we may note, That the Lawyer ascribes this unto Fate, because they were brought into bondage without any merit of their own; for all such were anciently ascribed to Fate. So Servius upon that of Virgil, Atti faite,
Of the Right to things taken in a Solemn War.

P P P There

C H A P. vi. Of the Right to things taken in a Solemn War.

faiz, observes, That the Poet endeavours to attribute nothing to the merits of the Trojans, but all to Fate. So Nævius concerning the Metelli, Fato fuit, Rome Metelli confules; The Metelli were made Consuls at Rome (as it were) by Fate, that is, without any merit of their own. In like manner, it is, when Souliers take any thing from their enemies whilst they are not upon Duty, nor executing the Commands of their Captain, but by permission of their Commanders, or by a promissious licence that Souliers do usually take on each side one against another; what, I say, is so taken is lawful prize to him that takes it; because it is not taken in order to any Command, but voluntarily, and is therefore given them as the reward of their valour. As when in pickering a Soullier overcomes, disarms or kills his Enemy, the spoil of that enemy is due unto him in recompence of his Virtue; so when a Party shall make an excursion freely without Command into an enemies Country, so as it be beyond ten miles from the Camp, according to the Roman Discipline (as we shall see anon) whatsoever they shall do take is theirs that take it.

And whereas we say, That by the Law of Nations whatsoever is thus acquired becomes directly his that takes it, we are so to understand it, that this was the Law of Nations before any thing in this Case was decreed by the Civil Law. For every State or People may among themselves otherwise determine of it, and prevent the right and dominion of him that takes it, as we may perceive it done in many places where Fowl and Deer are taken. So also the Civil Law may ordain, That whatsoever is found amongst us of or belonging to our enemies, the War being begun, shall be confiscate to the use of the Commonwealth.

But as yet as to those things that any man takes by any publick Act of a Solemn War, there is another reason why those things should not be theirs that take them. For herein every private Soullier represents the Body of the Commonwealth, and what is done by any one is taken to be done by the publick State that employs him; and therefore whatsoever, whether poiffion or dominion, any of them do thus take, (unless the Civil Law do otherwise determine) the people may be said to acquire; and therefore they may transfer their right thereunto to whom they please, and to what uses they please. But because this seems to be repugnant to the common opinion, therefore I shall endeavour to confirm it with more than ordinary proofs, which I shall draw from the examples of the noblete Nations. I shall begin with the Grecians, whose custom, in this case, Homer in severall places describes.

Omnis jam divisa, quibus spoliavimus Urbes.

Their Cities sack'd, the spoils divided are.

Achilles in the same Poet, speaking of the Cities which he himself had flourned, faith,

Omnibus his ingenio pretio numeique sappellex
Noftra repa. manu: Regi fed Victor Afrida
Cullos tuli, celere refidens qui pane carinatu,
Divideres cum pauce alius, fibi multa tenebat.

From which Cities Achilles brought to Agamemnon all the rich plunder which he divided, distributing some few things for others, but reserving the greatest part to himself. For here we look at Agamemnon, partly, as he was at that time Prince of all Greece, and representing the whole Body of the people; by which right he divided the spoil, but with the advice and consent of his Council: and partly as a General, and so out of that which was publick he claimed a greater share than others to himself; and therefore Achilles thus beffaeks Agamemnon,

Nam mecum teveprae pars aqua sequetur,
Si Danaum virtus Trojanum evertit Urben.

My part of th' prey with thine must not compare,
Though by our valour Troy subverted were.

And in another place Agamemnon by the advice of his Council offers unto Achilles a Ship laden with Brah and Gold, with twenty Women, which he might take first out of the spoil. Troy being taken, Virgil, speaking of King Priam's Palace, faith,

Custodes Letis Phainis & dirus Ulysses
Pradam asservabant: hue undique Troia gaza.
Incensis erepta adibs, Menfæque Deorum,
Ceratique Auro solidi, captivique vestis
Congeritur.

XIII. Unless the Civill Law do otherwise ordain.

XIV. What is taken by a publick act is his that maintains the War.
To Phaenix and Ulysses guard the Spoil,
And from all parts Troy's precious things do pile,
Snatcht from burst Temples, and from Altars rare,
Goblets of Gold, and sacred Vestments are.

Thus we read, That in after Ages Amfides preferred the Spoil at Marathon intire. And after the Battel at Platea it was feverely forbidden that any man should presume to take to himself any part of the Spoil; afterwards the Spoil was preferred and distributed among the people, according to each mans defects. After this, when Athens was conquered, Lynder led the Spoil of the City to be brought into the open Market. And the Lacedemonians had publick Officers who were appointed to make Fortfale of all their prizes taken in the War. If we look into Afis, Virgil will inform us, That the Trojans were wont to divide the Spoil by lot, as is usual; where things held in common are to be divided among many. In other places the Spoil was divided by the General, by which right Helier at the special ifinance of Dodonius promised to give him Achilles's Horfes, whereby we may understand, That this Right of gaining propriety was not always in the bare taking of the thing. So the Spoil taken in Afis was brought to Gyomos the Conqueror, and not distributed but by his order, whose whole care was to chufe out fuch things to offer unto the Gods as the Maji thought moft acceptable to them. If we look into Afis, we fhall find the fame curfom there. So whatfoever was taken at Agrigentum, or in the Fight at Canne, or in other places, was fent unto Carthage. Among the ancient Franks, whatfoever was taken in War was divided by lot; neither had the King himfelf any other share than what fell to him. Captivi & Prades inter Victores fere dividebatur; The Conquefors divided by lot both the Captives and the Spoil, faith Servius upon Virgil. But look how much more excellent the Romans were than other Nations in Military Discipline, fo much the more worthy are of our imitation. Dioniyus Halicarnafusenfis, a moft exact Obferver of their Manners and Ceremonies, thus instructs us in this Cafe, Whatever is taken from the Enemy by Valour in War, is decrved by the Law to be publick; fo that not only the private Soldier was forbid to claim any propriety in it, but even the General himfelf could claim no interest therein; but the Quader received it, and in an open Market exposed it to fale. These are the very words of thofe that undertook to accufe Corifalians to the people of Rome; which words, though true, yet fmet too rankly of envy and diftraction.

For that the people were the right Owners of the Spoil, was moft true (as Simler tells us in his History of the Switzers:) and yet it is a true, that the power of disposing thereof was allowed in every free State to the General, yet fo that he was to render an account thereof unto the people. Polybius concerning L. Amilius Paulus tells us thus: Being poftis of the whole Kingdom, and having it thereby in his own power to dispose of all things at his pleasure, he yet covered nothing. So doth Loying concerning the fame Amilius. Amilius, it is in the power of the General to destroy those Cities that are taken by the Sword, but not those that are surrendered; yet even in these thefe the defifion of the Spoil is in his power, and not in the Soldiors. But notwithstanding this power that cuflom hath given to Generals, fome of them to the end that they might fee themselves from all manner of flupicion, have widiy transferred it back to the Senate, as Camillus did. And they that have claimed it, have been observed to have difpoifed of the Spoil to feveral ufed, according to their feveral defigns, to the promo- tion of either Religion, Honour, or Ambition.

But thofe amongst them who defired to be, or to appear, moft holy, would not at all enrich themselves with the Spoils of the enemy; but whether it were in money, the Queflor of the people was commanded to receive it; or in other Goods, he was commanded to make Fortfale of them; and the money for which they were fold, went under the name of Manulius, as Fravinius in Gallius notes, and was by the Queflor brought into the Treafury. But in cafe there were matter for a triumph, then it was firft offentiously fwept to the people. Manius Curius called the Gods to witnefl, That he had not fo much as touched any of the Spoil, but only one poor Beecher Cup, whereunto he sacrifice to the Gods. But that of Amilius Pafulat, which Polybius records, is admirable, and for which all men did extol him for his magnanimity, namely, That when he had collected from the enemy an infinite mass of Gold and Silver, nec infipicere volurerit, he would not be tempted with the fight of it. But delivered it to the Queflor for the publick use. The like did Pompey, of whom Velleius writes, The money that he took from Tigrantes, he was ordered to deliver to the Queflor, as his custom was, and to be publickly registered. So also Marcus Tulius in his Epitile to Salluf, gives this testimony of his own integrity, De praedae meae prato Queflor Urbanos, Terentium nec arivis, nec tacentum effe quamquam; Befides the Queflors of the City, no man hath or shall touch the left part of the Spoil that I have got from the enemy. And this indeed was the general practice of the Romans in their moft ancient and beft days; whereunto Plutarch alluding, faith,

Nunc
Now all this spoil I'll to the Questor bring.

The like he faith, of Prisoners taken,

Whom from the Questor of the spoil I bought.

But others of the Roman Generals, did without the Questors make Port forfe of the spoil taken from the Enemy by themselves, as may be gathered from the ensuing words of Appius Claudius. Thus we read that the Sabines being vanquished by King Tarquin, he sent the Prisoners together with the spoil unto Rome. So likewise Romulus and Veturius being Confuls, the spoil was sold to supply the publick Treasury, which was then almost exhausted, the whole Army repining at it. But in a cafe so clear and so beaten, what need we any more testimonies? But yet this is worthy to be observed, That the spoil, or part thereof, was sometimes given to the Gods, sometimes to the Souldiers, and sometimes to others; to the Gods were given, either the spoils themselves, as those which Romulus was said to hang up in the Temple of Jupiter Feretrius; or being reduced into Money, that Money was employed to religious ufed: Thus was the Temple of Jupiter built on the Hill Tarpeius, with the Money raised out of the Pontentine spoils by Tarquin the Proud.

To give the spoil to the Souldiers, was by the Ancient Romans accounted as proceeding from Ambition. So Sextus the Son of Tarquin the Proud, but driven unto the Gians, is said to distribute the prey amongst the Souldiers, that thereby he might render himself the more powerful. Appius Claudius in the open Senate condemned such kind of largesses to Souldiers, as favouring too much of novelty, rashness, and prodigality: The spoil given to the Souldiers, was either divided among them, or taken, as when each man had what he could catch; when it was divided, either it was in lieu of their pay, in case it could not conveniently be reduced to money, and so brought into the publick Treasury, and this was never opposed by Appius Claudius; or else it was divided according to every mans merits for services then done. The order and method of this distribution is excellently described by Polybius, namely, the better part of the Army was sent out daily to fetch in the spoil, who were commanded to bring whatsoever they found into the Camp, where the Tribunes were equally to divide it. They that had the charge of the Camp, which from the practice of King David grew into a Law; and they that through sickness, or by reason of some publick employment were absent, had equal shares with those that were present: sometimes the spoil was reduced into money, which in lieu thereof was distributed among them; which in Triumphs was usually done. The proportions I find to be thus divided, sometimes to a Foot Souldier a single share, to a Captain of Foot a double, to an Horse-man a treble, and sometimes to a Captain a double proportion; else where, a single to a Foot Souldier, a double to the Captain: but to a Tribune, and to a Horse-man (or rather to a Captain of Horse, as Appiusrelates) a quadruple share. There was also sometimes a respect had to the merits of Souldiers. Thus was Caius Marcius, who had behaved himself gallantly, at the taking of Corioli highly rewarded for his valour out of the spoil of that City, before it was distributed among the Souldiers; but which way ever the spoil was to be divided, it was lawful to the General to take of the principal part of it, what he pleased unto himself, that is, as much as was fit: which also hath sometimes been granted unto others, as the reward, or an encouragement to valour. As Euripides speaking of the Trojan La dies faith,

—Qua principibus eximiae date
Erat Achivi,

—They that were most fair
Unto the Grecian Princes given were.

And of Andromachà he tells us, That Pyrrhus the Son of Achilles chose her to himself. 


bricius in his Oration to Pyrrhus, challengeth to himself this privilege, saying, That of the things taken in War, it was lawful for him as General, to take what and as much as he pleased; whose example Julian propofeth both to himself and his Army, as Ammianus testifies. Whereunto Iulianus hath respect, where treating of the Right of War, He divides the spoil into that part which was equally to be distributed among the Souldiers, with regard had to the quality of their persons and to their hard service, and into that which was the Princes or Generals portion. Tarquin the Proud, as Livy testifies, would both enrich himself with the
of the Right to things taken in a Solemn War. BOOK III.

bell, and pacifie the minds of the people with the reft of the spoil. Servullius in his Oration to Lucius Paulus, Thall, That it was in his power to have made himself rich in the division of the spoil. And there are fome of opinion, that it is that part only that falls to the General, which is signified by the word Manebus, amongst whom we find Alcimus. But much more commendable are thofe Generals, who can be content to forego their Right in this cafe, and amulfene nothing of the spoil unto themfelves, but the Honour of the Conquell; among whom was that Fabricius before named, who prefurred his own honour before riches though jufly got, which he confefsith he did in imitation of Walerus Publicola and fome few others; whose example M. Porcius Catus also followed in his Spanish Victoy, denying that he kept any thing to himfelf of the spoil he had taken from the Enemy, besides what he had eaten and drank; yet adding wifhul, that he did not thereby blame thofe Generals that had, or hereafter fhouild enrich themfelves by the spoil of their Enemies; but that he chose rather to emulate the beft of men in their vertues, than the weafleft in their riches. Next unto thefe are to be commend'd thofe Generals, who took somewhat of the spoil to themfelves, but very fparingly. Such was Pompey, whom Catius in Lucan commendes, for that he brought into the publick treafury much more than he left himself. In the division of the spoil, regard was fometimes had to fuch as were abfent from the fight, as it was ordained by Fabius Ambulius at the taking of Arxur; and fometimes no regard at all was had of home, though prefur: As when Cicinianus was Dictator, no refpect was had in the division of the spoil to that part of the Army, that was commanded by Munitius. But look what Right the Emperors had in the Ancient Commonwealth, the fame was tranflated when the Commonwealth was fitled to the Generals of the Armies, as appears by Justinian's Code; where from an infimation of acts done, all donations of thing moving themfelves and moveable were dilfarghed, which their Generals gave unto the Soulildiers out of the spoil of the Enemies, whether they were then occupied in the War, or in what places ever they were known to abide. But this divifion gave frequent occafion of calumny, as if thofe Captains did by that means purchafe favour to themfelves only, which was the crime charged upon Servullius, Coriolanus, and Camillus, as if they obfERVED their friends and clients by their liberality out of the publick fock; whereunto they plead that they had done it for the publick good, namely, That they that were present at the work done, receiving the fruits of their own labours, might thereby be encouraged the more willingly to adventure themfelves in other expeditions, which are the very words of Halicarnafus.

Therefore we come to Direction, when every private Soulildier held what he could catch; which licence was granted unto the Soulildiers, either in waiting the Enemies Country, or after a fet Battel, or at the frowning of a City that had been long belied: for then commonly upon a fign given, every man ran in and took what he could get; this licence was very rarelv given anciently, yet doth it not want fome precedents. For Tarquin we read gave the fpoil of the City Sfella to his Soulildiers. So did Q. Servullius the Dictator, the rifing of the Camp of the Equus. The like did Q. Fabricius, having defeated the PofTeis, and taken the City Ecrea, and afterwards fome others did the fame very often. Perfens being put to flight, Falerus the Conful gave the fpoil of thofe that were flain or maimed upon the fpoil to his Foot Soulildiers; but to the Horfe, the fpoil of the Country adjoining. So alfo by the decree of the Senate, did he give the fpoil of the Cities of Empus to the Soulildiers. The like did Sulla the City of Athens, Lucullus having vanquifhed Trignatus, did for a while refrain his Soulildiers from gathering the fpoil; but at length being affured of the Victory, he fuffered them to take it: He gave alfo the plunder of Thraco-aetia, as Pliny records, to the Soulildiers. The like did the Emperour Severus the fpoil of Cef-sphon to his; yea, and commanded his Tribunes, Captains, and common Soulildiers to plunder all the Villages about it. Mahomet the second to encourage his Army, promifed them all the fpoil and Captives they could find in Conftantinople. That which fome men do object againft this is, That it oftens comes to pafs, through this licence given to every Soulildier to catch what he can, that they that are greedy of plunder, do deprive thofe that are truly valiant, of the reward of their valour. For it is frequently fecn, that they that are moft backwards to fight, are moft forwards to plunder; whereas they that have magnanimously expofed themfelves to the greateft labour and danger, have reafon to expelt the beft part of the prey, which are the very words of Appius in Livy. Whereunto not very impertinent is that of Cyrus in Xenophon. In this way of partition, I mean by plunder, I very well know that the moft Soulildiers get moft: But unto this, it is commonly anfwered, That what any man takes from his Enemy with his own hands, is ever more acceptable unto him, than that which is allined him by others, though in value it be much les. Sometimes again it is permitted Soulildiers to plunder, because indeed it cannot eafily be prevented. So it was in the winning of Cortina a Town of the Hetrufians, The Tribunes ordered the fpoil to be fold: but Imperium quam conflitum regnius fult; The command came too late; for
the Soldiery had already got it, which could not without envy be retrieved.

Now whereas I said, that the spoil, or the money raised out of it, was sometimes divided among such as were no Soldiery; this often happens, when to the maintenance of the War, some men have liberally contributed, unto whom reliquity hath been promised to be made after the Victory to the full value: yea, and sometimes Plays and Interludes have been ordained out of the money raised by the spoil of the Enemy.

Neither is the spoil thus diversely disposed of only where the Wars are divers, but the same prey in one and the same War, is often set apart for divers uses, distinguitizing either by its parts, or by its kinds. So Abraham gave the Tenth of the spoil to Melchisedec. The like did Camillus to Apollo Pythius in imitation of the Greeks, who also learned it from the Hebrews; at which time under the vow of decimating the spoil, the Chief Priests did adjudge, That not only things moveable, as Money, Jewels, Cattel, and the like; but Towns, and Fields, and the like immovable things were also comprehended. The fame Camillus having conquered the Falby, allotted the greatest part of the spoil to the Quellor, yet reserved some small part of it to the Soldiery. So did Lucius Manlius also fell part of the spoil which he reduced into the publick treasuries; and yet took great care that part thereof should be divided among his Soldiery, as it was most just. The spoil of the Enemy may also be divided by its several kinds, which are these: either they are Captives, Drovers, or Herds of Cattel (which the Grecians when they speak proper, call, οικος, the prey) Money, things moveable, and the like either common and ordinary, or such as are more rare and precious. Q. Fabius when he had overcome the Volsci, commanded the prey and distributed it to be sold; but for the Silver, he reserved that for himself. And when he had subdued the Volsci and Æquus, the Prisoners he led beyond the Territories of Tusculum, and distributed them to the Soldiery; but the common people, and the Cattel, he left in the fields of Exetra for pilage and plunder. Lucius Cornelius when he had taken Antium, brought all the Money, whether Gold, Silver, or Brafs, into the publick Treasuries, caufed the Prisoners and spoil to be sold, referring for the Soldiery such things only as sufficed for food and clothing. Neither was that of Cincinnatus much unlike, who having taken Corbio, a Town belonging to the Æquus, sent the most precious part of the spoil to Rome, the rest he divided among the Soldiery by their Centuries. Camillus having taken Veji, brought nothing to the publick Treasuries, but the Money he had raifed by the selling of the Captives: But having Conquered the Hitrius, and made sale of the Captives; out of the Money so raifed, he restored to some Roman Matrons the Gold they had contributed to maintain the War, and laid up three Cups of Gold in the Capitol. Fabius having conquered the Lacanes, the Bruttii, and the Samnitics, did very much enrich the Soldiery, referred to every Citizen his Taxes, and brought into the Treasury Four hundred Talents besides. So did Fabius, when he had taken Tarentum, brought the Money raised by the sale of Prisoners into the Treasury; but the rest of the spoil he did impart among his Soldiery. Thus did Q. Fabius, and Appius Claudius, when they had taken Hannos's Camp, they fold the spoil and divided it, rewarding every man that had done any signal service in that fight. Scipio having taken Carthage, gave the spoil of the City to his Soldiery, referring only the Gold and Silver to gratifie his friends. Aemilius upon the taking of Lamma, divided among the Soldiery one part of the spoil, and fold the other. Cn. Manlius having subdued the Gallagrecians, and according to the then Romish superition, burn'd their Arms, fold the rest of the Prey; part whereof as he brought into the Treasury, the rest he divided among his Soldiery with singular care as was most fit.

Whence we may collect, That no lefs among the Romans, than among other Nations, the spoil did belong to the people of Rome, though the disposition thereof was sometimes granted to their Generals; yet so, that they were to give account thereof to the people: which we may learn amongst others, by the example of L. Scipio, who as Valerius Maximus relates it, having conquered King Antiochus, and added Asia to the Roman Empire, was afterwards (as Livy reports) condemned for enriching himself with the spoil that belonged to the Commonwealth, for he had received Four hundred and eighty Talents of Silver from the Enemy, more than he had brought into the Treasury. Cato in his Oration concerning the spoil taken from the Enemy, bitterly and reflectively complains of the licence and impunity granted unto their Generals in his time, in imbizzelling the spoils of the Enemy, and in robbing the publick Treasuries: A fragment of which Oration is recorded by Aulus Gellius in thefe words, Fures privatumur in nervo atque compedibus atatem agmus: Fures publicum in aura atque purpuram. Private Thieves we lightly load with bolts and fetters: But that rob the Commonwealth, are clad in Gold and Purple (and are indeed the only Gallants of our age.) So elsewhere the fame Cato wonders, That any man should dare to hang up in his own house those Engines that were taken in Wars, as if they were a part of his own household-stuff. Neither are Generals only guilty of this crime, but even private Soldiery,
Souldiers, in case what they do take from the enemy, they do not forthwith produce in publick. For they were all of them bound by Oaths, faith Polybius, that they should not pursuain or convey away any thing of the prey, but that they should faithfully discharge their trust in regard of their Oaths. The Form whereof we find recorded by Aulus Gellius, whereby they were obliged not to take away any thing, either within the Army, or within ten miles of it, thus was more worth than a small piece of Silver: or if they did, then they were to bring it to the Confid, or within three days to make open profession of what they had done: which gives some light to that of Medeptius, Is quod prudam ab hostibus surripit Peculatoris tenetur; He that steals away any of the spoil and keeps it to himself, is guilty of robbing the publick Treasury. And this one thing is sufficient to admonish those that expound the Law not to believe that the spoils taken from the enemy are peculiar unto those that take them; but unto the State that bears the charges of the War. For there can be no robbing of the Commonwealth but in those things that are either publick, sacred or religious. The result of all this is to shew, That setting aside the Civil Law, and primarily, whatsoever is, in the publick acts of a Just War, taken from the enemy, belongs to the Prince or people who are at the charge of making the War.

We add setting aside the Civil Law, and primarily or directly. The former, because the Law, whether made by the people, as among the Romans, or by the King, as among the Hebrews and other places, may dispoole of those things that are not actually possed to the benefit of the Commonwealth. And here under the word Law we understand also Custum, if rightly introduced. The latter I add, that we may know that it is in the power of the people to grant the spoils of the enemy to others, as well as they may dispose of other things. And that not only after they are got, but before; to that immediately upon the taking of them, Actions are commenced, brevi manum, as the Lawyers speak, that is, compendiously, declining the dilatory Forms of Suits. Which Grant may be made not only nominally, but generally alfo, as to Widows, to the aged and impotent, and to poor Orphans; as part of the spoil was thus given in the times of the Maccabites: or unto uncertain persons, in imitation of thole Sportrule which the Roman Confsuls and other Princes call among the people, whereof every man had liberty to catch what he would. Neither is the translation of this Right, either by Law or Grant, unto others always a mere donative. For sometimes it is due by some former Covenant or Agreement, sometimes in discharge of some Debt, or as a recompence for some losses received, or some extraordinary charge may have been at in the War either by purse or pains. As when a man serves in the War without pay, or for less than his pains deliveres. For in these cases it is usual, we fee, to grant either all, or some part of the spoil unto others.

It is also observed by Civilians, That Custum hath so far prevailed almost every where, that whatsoever either our Associates or Subjectts that serve without pay, and at their own cost and peril, shall take in the Wars, is their own. As to our Associates, the reason is manifest, because by the Law of Nature, they that are associated in a War, are bound to repair each others losses, which shall be occasioned by reason of the War which is common and publick. Befides, there are very few that will expose themselves to labour and danger for nothing; for this reason (faith Seneca) we usually reward Physicians, though they cure us not, Quod a rebus suis avocatis nobis vacant; Because we call them from their own affairs to serve ours. And the same reason likewise serves for Lawyers, as Quintilian notes, Because they tear out their time, and employ their whole study to defend other mens Estates, thereby neglecting all other means to improve their own. The very fame is given by Tacitus, Omitit res familiaris, in quas se alienis negotiis intendent; That he casts off all care of his own domestic affairs, that he may the better intend the good of others. It is therefore very credible (unles there shall appear some other cause, as namely, mere kindnes, or some former Contrac)) that it was the bare hope of gain by the spoil of the enemy, which they expected as a compensation for their losses of time and of their labour, that made them to expose themselves to so great dangers.

But as to Subjectts, the reason is not so evident; because Subjectts and Citizens owe their help and assistance to the Country or City whereof they are. But yet seeing that all Citizens either cannot or will not expose themselves to those hazards and hardships that attend War; therefore it is but reasonable that retribution be made by the whole Body of the people, unto such as shall sustaine the toil or the charges of it, but much more the damage that shall be thereby occasioned; in full recompence whereof, the hopes of the whole prey, or of an uncertain part thereof, is by the people eaily (and that not without reason) granted unto them. So thought the Poet,

Praedas fit hac illis quorum meruere labores. 

Theirs be the prey whose pains devolved it have.
As to our Associates, an example we have in the League that was made between the Romans and the Latines, wherein it was agreed, That in all the Wars wherein the Romans should engage them, the spoil taken from the Enemy should be equally divided between them. So in the Wars wherein the Eotolians engaged the Romans, it was agreed, That the Cities and Territories should be the Eotolians, but the Prisoners and all Moveables should be granted to the Romans. To the ancient Latines the Romans gave a third part of the spoil, as Pliny testifies. And proportionable to the succours sent, the free Towns of the Switzers received their share of the spoil, as Simler relates. In a War against the Turks, the Pope, the Emperor and the Venetians, divided the spoil according to their respective shares that they had in making the War. And Pompeius gratified Deiotarus King of Galatia with the better Armenia, because he had been his Companion in the War against Mithridates. S' Ambroge, upon the Story of Abraham, demonstrates the equity of this custom, Abraham, faith he, perhaps thought it but just, that they that came up to his assistance in that War, should likewise partake with him of the spoils, as being the reward of their labour. But as to Subjects, an example we have in the Nations of the Jews, where God commands Moses to divide the spoil of the Midianites into two parts, that is, between them that undertook the War and went out to Battel, and between all the Congregation. And in ver. 47. he subdivides that part which belonged to the Congregation, and gave the fiftieth part thereof to the Levites, that had the charge of the Tabernacle. Thus David divided the spoil taken from the Amalekites equally, between them that went down to Battel, and them that guarded the Stuff. Sometimes the Jews would divide the spoil, and grant half to the Southerns; and as to the other part, they admitted the maidam, the Widows and the Orphans to have share with them. So we read of Alexander's Souldiers, that they always challenged the spoil taken from private men unto themselves, only the most precious things they referred and presented to the King. Wherefore we find them accused for robbing the publick Treasury, who had confin'd to assume all the prey taken at Arbela to themselves, so as to bring nothing to the Treasury. But yet those publick things that belonged to the enemy, or to the King against whom they fought, were exempted from this Licence. Thus it was with the Macedonians when they brake into Darius's Camp, they carried away an infinite Mass of Treasure, leaving no place un rifed, but the Kings Pavilhon only; it being a custom received among them (as Curtius notes) as well as amongst most Nations, to receive the Conqueror in the Pavilhon of the conquered. The custom of the Hebrews was not much unlike this of the Macedonians; For they always set the Crown of the vanquifled King upon the head of the Conqueror, aligning all the Furniture of the Kings Palace or Pavilhon unto him, as his share of the spoil. And amongst the Acts of Charles the Great we find that having conquered the Hungarians, Whatever was taken from private men, he gave to the Southerns; but what was the vanquifled Kings was brought into the Emperour's Treasury. The Grecians distinguished them by their several names, calling the publick λαθρεια, but the private οικος, as also they did those taken in the Battel σωτα, but those taken after Battel, being publick, λαθρεια; which distinction was afterwards approved of by other Nations. But it is plain, by what hath been already said, That the Romans during their ancient Commonwealth did not allow to their Souldiers so much; yet they began to be more indulgent to them in their Civil Wars. Thus you may read Equilibrium given to the Souldiers for pillege by Sulla. And Caesar after the Battle of Pharsalia, gave Pompey's Camp to be pillag'd by the Souldiers, with this Complement,

-superaest pro sanguine merces,
Quacumque praerat mens ejf, nec enim donare vocabo
Quod sibi quisque dabat.

For lots of blood, a remembrance I'll make,
Not what I'll give, but what each man shall take.

And in another Civil War, the Flavians being led against Cremona, made all the haste they could the Night approaching, to storm the City, left the pilлагre thereof should fall unto their Commanders and Legates; having, it seems, been sufficiently instructed by Tacitus, Exempnas & Orbis pradom ad militum, dedixit ad Dacem pertinere; That the Plunder of a Town, if stormed, belonged to the Souldiers; but if surrendered, unto the General. But afterwards as the Discipline grew more reclined, so this Licence of pillagre was more willingly granted to the Souldiers upon this ground, left whilst the Victory was yet doubtful, the greediness of the Souldiers should make them neglect their Enemies, and over-haughty fall upon the prey, which hath often proved fatal to the Conqueror. When the Cæfard Volandium in Armenia was taken by Curbulo, Tacitus tells us, That the common people were fold, but the rest of the spoil was the Conquerors'. The same Tacitus brings in Suetonius encouraging his Souldiers to pursue their Enemies, and not at all to mind the pillagre, alluring them that the Victory being ascertained, the spoil should be their own. So in Procopius we read that all
all the pillage taken at Picenum was brought to Belisarius, that he might divide to every man according to his merits; the cause whereof is added, for, faith he, it is most unequitable, that whilst some with much toil and labour are killing the Drones, others without any labour or peril should devour the honey. And in another place he tells us, that the Soudliers were much incensed against Solomon when he warred against the Levites, because he detained from them the prey, who excused himself, in that he did it for no other reason than that at the end of the War he might therewith reward every man according to his deserts. There are some things of so small value, that they are not worth the publication, or expounding to fale, they are usually granted to those that take them: such in the old Roman Commonwealth were a Spear, a Javelin, Fodder, Fuel, a Bottle, a Pair of Bellows, a Torch, and any thing else of its value than a small Piece of Silver. For all these are expressly excepted in the Military Oath given to the Soudliers, as we may read in Gellius. Not much unlike is that which is allowed to Sea-men and Mariners, although they are under pay. The French call this the spoil or pillage, wherein are comprehended Apparel, Bedding, Fuel, Gold also and Silver, under ten Scutes, sometimes the fifth part, sometimes the third, sometimes half the prize, belongs to the King, as it doth in Spain; and the seventh, and sometimes the tenth to the General of the Army; the rest belongs to them that take it, except Men of War with all their Tackle, which are always the Kings, and fo are all Engines of War amongst the Swedes. In some places again, regard is also had to the labour, peril and charge that any man hath been at, and allowance is made in the partition of the spoil accordingly. In Italy, a third part of the Ship taken in Fight is the Masters of the Ship that took it, and as much belongs to them whole Goods the conquering Ship is laden withal, and another third is theirs that fought and took her. And sometimes it falls out, that they who at their own charge and peril maintain the fight, do not carry away the prize, but some part thereof is due to the State, or to him, at least, that derives it from the State. As in Spain, they that fet out the Ship upon their own charge, yield a part of the spoil taken to the King, and a part to the Admiral of the Seas. In France the Admiral claims the tenth part; so also in Holland. But there the State first takes the fifth part to themselves. Thus it is at Sea, but at Land in the taking of Towns, and in Battels, every man usurps that which he takes to himself. And in excursions into the Enemies Country by Parties, whatsoever is so taken is divided among them that take it, according to every man's merit and dignity.

What hitherto hath been said, serves to this end, That if in any Nation, not embroiled with War, any Suit or Controversie arise concerning any thing taken in War, the things shall be adjudged unto him to whom the Laws and Customs of that people from whole parts they were taken, shall determine. But if nothing can be thereby proved, then by the common right of Nations the thing so taken shall be adjudged to the State or people themselves, if at least it were taken in the act of War. For by what we have already said it is plain, that what Quintilian sometimes said in the behalf of the Thebans doth not always prove true. As to what may be brought under the royal of the Law, the right of War avails nothing; neither is it a good Plea to say, It was gained by Arms, unless by Arms we can retain it.

But whatsoever is not the enemies, though it be found with the enemy, shall not be adjudged to them that take it. For this, as I have already said, is neither agreeable to the Law of Nature, nor was introduced by the Law of Nations. So the Romans in Lex answer Prusias, If the Lands in question were not King Antiochus's, neither could it by Conquest belong to the Romans. But if the Enemy had any right or interest in those things which were annexed to the possession, as if it were taken by him as a Pledge for some Debt, or if it were retained by him for the performance of some Covenants, for service or the like, that was for the advantage of the Enemy. In all or any of these Causes, I see no reason but that whatsoever was the Enemies is transferred unto the Conquerour. This also is sometimes controverted, Whether persons or Goods taken without the Territories of either of those Princes or people that are at War against each other, be theirs that take them. Whereunto it is answered, That if we respect the Law of Nations only, no place can give an Enemy protection: for as we have already said, Every where an enemy being found, may be killed. But yet he that hath the supreme power in that place, may at his pleasure prohibit the prosecution of an Enemy within his own Dominions; and in case of disobedience, may require satisfaction as for an injury done against himself. The like may be said concerning Deer taken in another mans Ground, That they are his that takes them; but it is lawful for him whole Ground it is, to prohibit his access unto them.

But this external Right of gaining things taken in War, is by the Law of Nations so peculiar to a Solemn War, that in other Wars it can take no place. For in other Wars amongst Foreigners the Right to a thing is not gained by force of the War, but only in compensation of some Debt, which cannot otherwise be recovered. But in Civil Wars, whether they be great or small, there is no change of Dominion, but by the Authority of a Judge.
C H A P. VII.

Of the Right over Captives taken in War.

I. That Captives taken in a solemn War, are by the Law of Nations, slaves.

II. That, and their posterity.

III. That whatsoever is done unto them is unpunishable.

IV. Even the incorporated things that belong to Captives may be acquired by War.

V. The cause why this was ordained.

VI. Whether Captives may make their escape.

VII. Or refist their Lords.

VIII. That this Right is not allowed in all Nations.

IX. Nor now amongst Christians, and what proceeds in its room.

THERE is no man by nature servant to another, that is, no man in his primitive state or condition confidered, without any fact done by himself, whereby his natural liberty is impeached, as I have elsewhere showed; in which sense our Lawyers may be underfloud, when they say, that to have another man slave is against nature: But that this kind of slavery might at first be introduced by some fact done; namely, by some voluntary agreement, or for some crime committed, is not repugnant to natural justice, as we have elsewhere also shewed. But by that Law of Nations, whereof we now treat, the word Servitude is of a larger extent, both as to persons, and as to its effects; for as to the persons, not only they that surrender themselves to the will of the Conqueror, or that oblige themselves by promise to do, but all persons whatsoever that are taken in a solemn War, as soon as they shall be brought within our Garrisons, are altogether accounted Captives or Slaves, as Pomponius hath well observed. Neither is it to any purpose to plead, that they never bare Arms against us, nor declared themselves Enemies by any Hostile Act, seeing that in this cafe, Par eft omnum fortuna; Every mans condition is alike; yea, even the condition of thofe, who by mere fate happen to be found in the Enemies Territories, at such time as the War unexpectedly brake forth. Polybius speaking of Captives taken in actual Arms, puts the Quetion thus, Quid patiendum est ut justa supplicia pendent? What must these men suffer that their punishment may be just? If any man say they may be laid with their Wives and Children, he answers, At hac bellis legi etiam illis ferenda sunt, qui nihil impili committerunt; But fo, faith he, may they be by the Law of Arms, who never did us hurt. Philo notes the very fame where he faith, That many good men lose their natural liberty, by occasions that are involuntary, and merely accidental. Dion Proxenetus recounting the several ways whereby a man may get Dominion, assigns this as the third, When a man hath taken a Prisoner in time of War, that never did any act of hostility, and by that means makes him a slave: So Children being taken in War may be led away and made slaves. Servius upon the first of Virgils Æneas speaking of Hebe the Daughter of Laomedon, whom Hercules slew as he was going out of Troy, faith, That she was taken Prisoner by the Law of Arms, and given to Telemon, Hercules his companion. And in another place he tells us, That the Greeks refused to deliver her back to the Trojans, saying, she was a Prisoner of War.

Neither are the persons of Men and Women only, thus taken made slaves, but their posterity for ever; for whoever is born of a Woman after her Captivity, is a slave born; for, Partus sequitur ventrem; The Child will follow the condition of the Mother. Martius accounts all those for slaves by the Law of Nations, who are born of Bond-women. And Tacitus speaking of the Wife of Arminius a German Prince, who had been taken Prisoner by Germanicus, faith, That she had Virum servitutis subjectum; meaning, that whatsoever Children were born of her were bond-slaves.

The effects and consequences of this Right are infinite so that there is nothing so unlawful but the Lord may do it to his slave, as Seneca the Father notes, there are no Torments but what may with impunity be imposed on them, nothing to be done but what they may be forced to do by all manner of rigour and severity; so that all kinds of cruelty may be by the Law of Nations, without controul or appeal be exercised upon Captives, were it not that this licence is somewhat restrained by the Civil Law. It is universally indulged by all Nations, to the Lord to have power of life and death over his slave, faith Caesar the Lawyer; but he tells us withal, That the Roman Laws did limit other wife unbribled power within their own Territories. Quid non jus sum Domino in servorum? What may not the Lord do unto his slaves, faith Julianus upon Terence? yea, not only the person, but all that is taken with him are lawful prize, Ipsi servus qui in poenas est, alius esse nihil saepe patebit habere; He that is a slave, faith Justinian, and under the power of another, can have right to nothing that was his before. So likewise Philo, He that is a Captives
Capitu left his right to all other things, no less than the power over himself.

Hence then, their Opinion may be confuted, or at leaft restrained, who hold that things incorporeal cannot by the Law of Arms be acquired. * Val. Maximus records it of Sepio Nafica, That whereas being Conful he was taken prifoner by the Carthaginians at Lipara, and by the Right of War had left all; yet fortune afterwards smiling upon him, he recovered all, and was again created Conful. It is true, that primarily, and by it self, things incorporeal cannot by War be gained, but they may be left as to the prifon who formerly were. But yet we muft here except all things that do proceed from some singular property in the prifon taken, which by no means can be alienated, as the right of a Father to his Son, for such Rights, if they do not remain with the prifon are altogether extinct.

Now all this unlimited Power is by the Law of Nations granted for no other Cause than that the Conqueror being allured by fo many advantages might be willing to forbear that utmost cruelty which they may lawfully use by killing their Captives, either in the heat of flight, or afterwards in cold blood. The name of fervant, as Pomponius tells us, did at first arise from thecustom of Generals who sold their Captives, and thereby preferred them from being slain; (* Servi quafi fervari:) That they may be the more willing to forbear, I say, for it is no bargain or agreement, whereby they fland obliged to fave them, if we respect the Law of Nations; but a perfwafive argument drawn from profite, it being far more beneficial to the Conqueror to fell his Prifoner then to kill him. And therefore he hath the fame power to transfer his Right in his Captive to another, as he hath to aflign over unto others the Right and property he hath in any of his own Goods or Chattels. This Power is also extended to the Children that are born after Captivity, becaufe if the Conqueror had used his power to the utmost, they had not been born. From whence it follows, That the Child that is born before that Captivity, in case he be not taken Prifoner, remains free. Therefore by the Law of Nations, the Children born of fuch Captives follow the Mothers condition, becaufe their Chafility is not provided for by any Law, nor is there any ftrait guard kept upon them; and therefore no pre- fumption how great fcorer is sufficient to prove who is the Father. And thus is that of Opian to be understood. Lex Naturae habet, ut qui nаждurit, sine legitimo matrimonio materem sequatur; The Law of Nature is this, That he that is born without lawful marriage, should follow the condition of the Mother: that is, General custom grounded on some Natural Reason hath moulded this into a Law (*abusively sometimes fo taken, as we have already elfewhere fhewn) they that are born out of wedlock fhould retain the name and quality of the Mother, and not of the Father, becaufe of the certainty of the one, and the uncertainty of the other. But that this unlimited Power over Captives was not introduced by the general consent of Nations in vain, we may collect from the usual practice of Civil Wars, wherein all Prifoners are commonly put to the fword, becaufe they cannot be sold for slaves, which was well obferved by Plutarch in the life of Otbo; and by Tacitus, who speaking of the Captives taken at Cremorne, faith, Iriani pradami militis omnibus servarum confequtis Italiz; That it was agreed throughout all Italy, that no quarter fhould be given: whereby no booty came to the Souldiers by the fale of Prifoners. Moreover, whether the Prifoners taken fhould belong to the people, or to them that take them, muff, by what hath been faid of the fpoil, be determined. For the Law of Nations hath in this cafe equalled the condition of men with goods: So Caflus the Lawyer, Thofe things that are taken from the Enemy are by the Law of Nations theirs that take them; fo that even fuch as were free men are by this Law reduced into bondage.

Neither can I concur in Opinion with thofe Divines who hold, That Captives taken in an unjust War, or such as are born of them, are obliged in confequence not to make their efcap, unlefs it be to their own Garrifons, for herein I believe they err; Surely in this lies the difference, if they can fly and make it good to their own Garrifons, whilft the War lafths, by the Right of Pofliminy they recover their liberty, and all things confequent to it. Of M. Sergius Pliny reports, that being twice taken by Himation, he both times made his efcap out of his chains. But in cafe they make their efcap to others, or unto their own Country after the Peace made, being re-demanded they are to be delivered. But yet from hence it follows not, that the Captives themselves are bound in confequence to return; for there are many Laws which bind only as to the outward judgement, which do not at all refrain the confequence; and fuch are thefe of War whereof we now discourse: neither is it much to the purpole to fay, that the very nature of Dominion doth of it fell induce fuch an obligation; becaufe there being many kinds of Dominion, possible it is, that fuch there are as are of force only in humane judgement, and fo long only as the coercive Power lafths, which is frequently fecn in other kinds of Right. Such in some fort alfo is that Law that makes void some Teftaments, becaufe, forfooth, they want fome formalities which the Civil Law requires; whereas the more probable Opinion is, that what is beaten up by fuch a Teftament, may with a good confequence be retained,
The Right over Captives taken in War.

Chap. vii.

The Right over Captives taken in War.

...the Right, which hath according to the Civil Laws unfaithfully prescribed to another's Estates; for by the judgment of those Laws, even this man's Title shall be defended, until it be made void by another sentence of the same Law. And thus it is ridded of Aristotle resolved, If it is not just (faith he) that every man should enjoy his own, but whatsoever the Judge hath according to his understanding decreed, it is Law confirmed (though in itself it be false) therefore will the same thing be both just and unjust. But in this question of ours, there is no cause imaginably why the Nations should respect any other Right than that which is external, and meerly humane. For the Right of laying claim to a Captive, of forcing him, of binding him, and putting what he hath, or can do, is of itself motive sufficient to perforce the Conquerours, that it is a greater advantage to them to keep them alive than to kill them. But in case this cannot move the Conquerours, purely, no obligation that can be laid upon the confidence can do it, which notwithstanding he may impose, by requiring either his verbal or sacramental engagement, if he think it necessa-

In such Laws as ante not out of natural equity, but are purposely made to avoid a greater mishap, we must not rashly admit of such an interpretation, as makes that act to be infull, which is otherwise lawful. Nihil interest quoniam captivus reservat eis, stranum diminutus, an vi, aut faddicit potestatem hostiam confert; It matters not much (faith Florentinus) which way a Captive gets loose from his enemy, whether he be freely discharged, or make his escape either by force or fraud. Because the right of holding a man Captive is for a Right, that in another fenfe, it is for the most part an injury; for which reason Paulus the Lawyer calls it, a Right as to some certain effects; but an injury as to the intrinsic nature of the thing itself. From whence this also appears, That a man being taken in an unjust War, and brought within the Power of the Enemy, cannot in his conscience be guilty of theft, though he do, as I said before, convey away with him somewhat that was his own; or though not his own, yet that is due unto him as the reward of his labour: If at least he have reserved any thing besides his suffurance, provided that he himself owe nothing unto either his Lord, or him from whom his Lord claims his Right unto him. Pertinent hereunto are those Testimonies of Irenæus and Tertullian, concerning the departure of the Israelites out of Egypt, and their carrying away their Goods with them; which fact Irenæus seems to defend by the Law of Nature, as being but the recompence of so many years hard labour: for faith he, The Egyptians were indebted unto the Hebrews, not only for their Goods, but for their lives. Tertullian also handling the same subject speaks thus, The Egyptians demand of the Hebrews their vessels of Gold and Silver; the Hebrews on the other hand allege, That the Egyptians owed them much more as due unto them for their long hard service. Thus also Philo pleads for his own Countrymen, That they spoiled not the Egyptians out of Crowtons, but first as the reward of their long labour, and then as a gentle mite or punishment, far inferior to their great oppression. Neither is it much to the purpose to say, that such an escape and taking away of Goods is usually severely punished, if the Prisoner be apprehended; because such, and far greater acts of injustice are usually done by men of Power against their Inferiors, Non quis aqua fuit sed quis stippe expetit. Not because they are just and equitable, but because they are for themselves expedient. Nor whereas some Canons do prohibit any man from perceiving any servant to forfak his Masters service: I anfwer, That in cafe such prohibition be referred to such Servants, as are defervedly punished with the loss of their Liberty, or have by some voluntary covenant or bargain made themselves servants, then it is just: but in case it be referred to fuch as are made slaves by the misfortune of an unjust War, or to fuch as are born of them; it only argues, that Christians ought to perforce Chriftians to Patience and Sufferance, rather than to such courses, which though lawfull, yet may give offence unto others. In like manner, are those admonitions of the Apostles to Servants to be understood, unlefs we had rather lay, that those admonitions seem only to perforce Servants to strict obedience whilst they do serve; which indeed is but conformant to Natural Equity, for their labour is but equivalent to their suffurance.

But whereas the fame Divines hold, That a Captive ought not to refit his Lord in the execution of that external Power that he hath over him without injustice; therein I agree with them. But yet between those things which before I denied, and this that I here af-

See the second Book, chap. 4. of the Gospels.

Synd. Ganger, See the second Book, chap. 5. towards the end.

VII. Whether they may refit their Lords.

Q q 2 which
which we have elsewhere granted unto the Supreme Magistrate in every City, whom forceably to releive is unlawfull, nay, impious. And therefore St. Augustin unites these two Powers, saying, That Subjects should so bear with their Princes, and Servants with their Masters, that in the exercise of their patience they may preferve their temporal estates, and hope after eternal.

This also we must obserue, That even this Law of Nations as to Captives hath not at all times, nor amongst all Nations been received; though the Roman Lawyers are pleased so to understand it, taking perhaps the Customs of those Countries which were then most known to them, for the Universal Custome of all Nations. Among the Hebrews (who did at little mix their Customs with those of other Nations, as they did themselves in Marriages) there were places of refuge for Slaves, namely, for such as became such by fate or misfortune, rather than by any fault of their own; whereupon seems to be grounded that priviledge which among the Francks is given unto Slaves, to proclaim themselves at Liberty, which is also now indulged, not only to such as are taken in the War, but to all other Slaves whatsoever.

But in among Christians it is universally agreed, That being at War amongst themselves, they that are taken Prisoners are not made Slaves so as to sell them, or to enforce them to servile offices, or to impose upon them such things as they usually do on Slaves; And there is good reason for it, for they either are, or at least should be better instructed in the Principles of Christian Charity, than not to abaine from the shedding of the blood of those whom misfortune only hath made miserable, unless it be granted them, that they may be permitted to use a little less cruelty. It is a Custome generally received among Nations of the same Religion, That what Goods or Chattels sever are taken in War, are lawful prize; And for men taken in War, they neither make them Slaves, nor kill them in cold blood, as Gregorius testifies. Boecius also makes mention of this Custome, whereunto he adds, That it is observed in France, in England, and in Spain, That in case a Duke, a Baron, or an Earl be taken in War, they are not their Prisoners that take them, but the Prince's that maintains the War. And this at least (though but a small matter) hath Christian Religion brought to perfection, which Socrates attempted to have done among the Grecians but could not. The same Custome which Christians observe among themselves, do the Mahometans likewise observe among themselves; yet notwithstanding even among Christians this custome still remains entire, That such as are taken in the Wars are kept in salve custody till their ransom be paid, which commonly is set as the Conquerour pleaseth, unless otherwise agreed before hand: Which Right of keeping Prisoners is usually granted to those that take them, unless they be perfons of honour, who are always kept and maintained at the charge of the Common-wealth, or of the Supreme Magistrate, according to the Custome of Nations.
C H A P. VIII.

Of Empire over the Vanquished in War.

I. That a Civil Empire, whether in a King or people, may be acquired by War, and what the effects are of such an acquisition.

II. Such an Empire may be gained over a people as is merely despoticall, and then they cease to be a City.

III. Sometimes a mixt Government is acquired.

IV. Sometimes even the incorporeal things of the people may be acquired by War, where also is handled the Bond given by the Thebians to the Thebans, forgiven by Alexander.

I t is no marvel that he who can bring into subjection every particular person, can also subdue the Body Politick, whether it be a City, or part of a City, and whether that subjection be merely civil, or merely despoticall, or mixt. This Argument we shall find used by Seneca in that Controversie which is de Ophysio, where he brings in one pleading thus. He is my Slave whom I bought by the right of War; and very expedient it is for you, O ye Athenians, not only to acknowledge my Title to be just, but to defend it; otherwise without ending all your great Conquests, your Empire also must be confined within your ancient Territories. Wherefore Tertullian acknowledgeth, That Empires are gained by Armes, but enlarged by Conquests. So likewise Quintilian, Kingdoms, Nations, and the Bounds of Cities and Countries, are determined by the Rights of War. Alexander in Curius claims by this Right, saying, That Laws are usually given by the Conqueror, and received by the Conquered. Thus Mimeo in his Oration to the Romans, Why do ye Romans lend every year your Pretor with the Ensigns of your Empire, the Rods and Axes into Syracuse, and other the Grecian Cities in Sicily, for which ye can give no other reason but this, That having conquered them by your Armes, you impose upon them what Laws you please. Ariovalus in Caesar's Commentaries faith, That by the Law of Armes, the Conqueror may govern the Conquered in what manner he pleaseth; and that the custom of the Romans was to govern those Cities which they had by their Armes subdued, not after other mens prescription, but according to their own will and pleasure. Tityler likewise out of Trogus tells us, That before Niuss, Princes that made War, fought not Empire but Glory; and therefore were contented with the honour of the Victory, but fought not to enlager their Kingdoms: and that this Niuss was the first that ever incroached upon another mans dominions, and from him it became a custom, Bocchur in Salut pleads, That he took up Arms only to defend himself; for that part of Numidia, from whence he had driven Jugurtha, was made by the Law of Armes. But a Right may be gained by a Conqueror, either so far only as it was in the King or some other Governor; and then he succedees in his Right only, and no farther. So Alexander after the Battell at Gaugamela was saluted King of Asia. And the Romans also claimed unto themselves all that was Syrops by the Right of War. But when the Huns pleaded to the Romans, That the Country of the Gepide was theirs, because they had taken their King Prisoner: the Romans denied it, because the Gepide were governed by a Prince rather than by a King; for that the Kingdom was not Patrimonial. And therefore they conclude, That he could not do more than what was his own. Or it may also be gained, as it is in the people, and then the Conqueror hath as much power to alienate it as the people had; and thus do some Kingdoms become Patrimonial, as I have elsewhere said. Thus the Perrians in Alexander plead for the Territories of the City Daras, For, say they, since the City Daras it self is by the Right of War subdued by us, it is but reasonable that what belonged to that City should likewise be ours. So Bithurians having conquered the Vandals, would have had Libysiam in Sicily yielded up to the Romans; because, as they pretended, the Goths had before given it to the Vandals, which the Goths denied.

Or an Empire may be yet more absolutely gained. For such a Government may by War be gained, as that which was before a City, may cease to be any more a City, but be rather reduced (as it were) into a Family; which may be done either by adding it unto another City, as Kings were by the Romans annexed to their Empire as Provinces; or by annexing it to no other City, (but by destroying its Character, and nulling the Government thereof;) As for example. When a King maintaining the War at his own proper charge, doth so enslave the people, that in his Government over them he minds his own private gain and interest only, and neither their profit nor safety; which kind of Government is Despoticall, and not Civil. Aristotle thus distinguishing them, Of Empire, faith he, some are altogether fitted to the profit of the Prince, others for the profit and safety of the Subjects; this is proper to Monarchy, that to Tyranny. Now the people that are held under this kind of Government, are no longer Citizens, but a multitude of Servants in a great Family. It was well said of Anaxandrida,
A multitude of Slaves can never constitute a City. Which distinction is allowed of by Taci- 
tus, He did not carry himself, faith he, in his Government as a Lord over his Slaves, but as be-
ing chief among his Fellow Citizens. So Xenophon of Athens, What Cities sooner he reduced 
under his obedience, he made free by exempting themfrom the slavery which Captives pay unto 
their Lord, and by compelling himself with that obedience that a free people do willingly yield 
unto their natural Prince.

Whence we may understand the nature of a mixt Monarchy, that is, between that 
which is Despotical, and that which is Civil; as namely, when our servitude is mixt with 
some kind of personal liberty. Thus we read, that to some people the use of Armes are 
forbidden by the Conquerour, and that no iron shall be wrought into any thing, but such 
Instruments only as are necessary for ploughing the Earth, and such like. So some people 
being conquered, are enforced to change their language, others to alter the whole course 
of their lives, and the like.

Now as whatsoever any particular Prisoner had when he was taken, was by the Law of 
Arms his or theirs that took him; so whatsoever belongs to the people in general is his or 
their that subdue them, if they will take it. For what Lucy faith of such as surrender their-

IV.

That even the incorporeal things of the 
people, may be 
by War gain-
ed.

See Book 1. 
Chap. 4. Sect. 8. 
Book 2. Ch. 
5. Sect. 31. 
Book 3. Ch. 6. 
Sect. 2. and 
Ch. 20. Sect. 
49. 
Vid. Ch. 7. 
Sest. 8.

them- selves, namely, All are given up to the Conquerour; so that what he will take to himself, and 
wherein and how far forth he will punish the Conquerour, is wholly in his own power. The 
very frame of a Solemn War may be faid of those that are conquered. Thus Polybius, They that 
yield themselves up to the Romans, do yield up the first place their Country, and what Towns and 
Cities foever are theirs, together with all their Men and Women that are in them; then all their 
Revers and Ports, and generally all things sacred and religious: so that the Romans are Lords of all, 
and they that thus surrender themselves have nothing left. And the fell fame Right hath the 
Conquerour over those that are actually conquered in a holmn War. For dedication doth 
but voluntarily yield up that which otherwise would be taken away by force. Hannibal 
encourageth his Soulers, being ready for Battel, with this Argument, Whatsoever the 
Romans have by so many Conquests got and heap'd up, shall together with themselves be ears af- 
ter the Victory. Thus all that Miltiades had by force of Armes added to his own, Pomp- 

CHAP.
CHAP. IX.

Of the Right of those that return out of Captivity.

I. The original of the word Postliminium.

II. In what places this Right takes place.

III. By this Right of Postliminium, some things are said to return, and some things to be received.

IV. This Right appertains both to War and Peace, and when, if in the articles of Peace nothing be said.

V. When a freeman during the War, may return and be admitted by this Right.

VI. What Rights he may receive, and what he may now.

VII. All Rights are recoverable from him.

VIII. Why they that yield themselves are not admitted to this Right of Postliminium.

IX. When a people may obtain this Right.

X. In those that return by Postliminium, what things are required by the Civil Law.

XI. How servants are received by Postliminium, how fugitives; and how they are received that are redeemed.

XII. Whether a people formerly subdued, may recover their freedom by Postliminium.

XIII. That Lands may be received by Postliminium.

XIV. What difference was anciently made between things moveable.

XV. What the Law now determines concerning things moveable.

XVI. What things may be received, that need not this Right of Postliminium.

XVII. That the Civil Law may change some things among their own subjects.

XVIII. How Postliminium was observed between those that were not Enemies.

XIX. When this Right may be now in force.

There are none of our modern Lawyers, who have written any thing solidly, either concerning things taken from the Enemy, or concerning the Rights due unto them, who having been taken Prisoners, yet have either by favour, force, or fraud, escaped and got home again. The Ancient Romans had handled this Quellion somewhat more accurately, but yet oft-times so confoundedly, that the Reader cannot distinguish between what is due by the Roman Civil Law, and what is due by the Law of Nations. Concerning the word Postliminium, that opinion of Servius is to be exploded, who held, that the latter part of the word signifies nothing. That of Scevola pleareth better, who makes it a compound word, of post which signifies a return, or coming from beyond, and Limes, or Limes, which signifies properly the whole breadth of an Houfe, or the utmost bounds or frontiers of a Country: for Lumen and Limes, though they differ not less in flection, than in termination, as Matter and Materies; yet are they both derived from that old Verb Lima, which signifies transvere or overthwart, as Servius upon Vergil, and Donatus upon Terence obferve; from whence Limes sculat aliquem intueri, is, to look a fquint upon a man: Though by the latter use of the word, Lumen be referred to things private, and Limes to things publick, as to the bounds or borders of Kingdoms. For, as Isidore notes, all oblique or crofs-ways, the Ancients called Lema: from whence, the thresholds of doores, which we go in and out, are called Lima afferiam. So the Ancients when they banifhed any man, were faid eliminare, to thrif him beyond their marches; and banifhment they called Eliminum, a thrifling out of their bounds and Territories.

Postliminium therefore is a Right that arifeth unto a man that was a Captive upon his return from Captivity; that is, upon his entering within the Frontiers of his own Country. So Pomponius. He is faid to be returned out of Captivity that begins to be within our own Garrifons; or as Paulus faith, that enters within the bounds of our Territories. But by a parity of reason, it is by the general confent of Nations granted, That the Right of Postliminium takes place, as soon as the Perfons that was a Captive, or any other thing that is capable of this Right, shall come within the Guards or Garrifons of our friends and Associates, as Pomponius speaks; or as Paulus expounds it by way of example, as soon as he shall enter into any Garrifon that belongs unto such a King or State, as are our friends and companions in the fame War. For so indeed are thefe words (Friends and Associates) here to be understood, not of any Nation or King with whom we are at peace, but of such only as are fo Confederate with us that they are parties in the fame War, into whose Garrifons whofeever enters out of Captivity, shall enjoy his former Rights, and be defended upon the publick account. It matters not much whether they that fo return are men or things, or whether they come into our Garrifons, or the Garrifons of our Associates: But in case they that are taken Captives, shall fly into the Dominions of our Neighbour King, who though at Peace with us, is not associated with us in the fame War, they shall not change their condition of being Prisoners; unless it were before fo expressly agreed, as it was between the Romans and the Carthaginians in their second League, That if any of the friends of the Romans, being taken by the Carthaginians,
thegians, could escape out of any peoples Territories that were friends to the Romans, inreany of their Ports or Cities that were Subjects to the Romans, they might enjoy their liberty; the like provision being made for the friends of the Carthaginians. And therefore when some of the Romans, being taken in the second Punick War, were sold by way of Traffick into Greece; they were not admitted to enjoy this Right of Poistliminy, because the Grecians in that War flood Neuters: and therefore it was necessary that they should be first ransomed before they could be set at liberty; yea, and although Flaminius, having conquered King Philip, had fet all the Cities of Greece at liberty, yet would he not take away from their Mafiers by force tho all Captives, which had been formerly sold by the Carthaginians unto the Grecians; but the Achaians to gratifie him for their liberty, bought Twelve hundred of them who were difperfed though Greece, and presented them to Flaminius, who received them as a Present of great value. So did the Rhodians buy the Athenian Captives, taken in the War that King Philip made in Greece, and frankly restored them to the Athenians. And in Homer we read of divers persons taken in War, that were sold into such Countries that were in Peace.

The Ancient Romans did always account those that were received out of Captivity as freemen. Callus Aelius in his first Book of the Significations of Law Terms, faith, That he who being free of one City did voluntarily depart to another, and afterwards did return into that City, whereof he was at the first made free, was said to be Poistlimino recep- tus, that is, admitted to his old freedom by that Law, which provides for such as return out of Captivity. As also in case a servant being taken from us, and carried Captive into our Enemies Garrison, should afterwards return unto us, he may by this Law of Poistliminy place himself under his old Master. So Horfe, Mules, and Ships, by a party of reason, had the same right of reception as servants. And look what kind of things do return unto us by this right, the very same may return from us to our Enemies. But the Ancient Roman Lawyers have more distinctly admitted but of two sorts of Poistliminy; as namely, when we either return, or receive something that is returned.

Neither may we altogether reject that of Trophonius; namely that this Right of returning out of Captivity into Freedom, may be of use as well in Peace as War, though in a little different fene than as Pomponius expresseth it. This Right of Poistliminy in Peace, appertaineth unto those who were not conquered in War by force of Arms; but were through misfortune surprifed within the Enemies Territories, when the War unexpectedly brake forth. But to other Captives there belongs no such Right in times of Peace, unless it be otherwise agreed on by both parties at the making of the Peace, as it was at the conclusion of the War between Jonathan and Bacchides recorded by Josephus. Polybios among other Articles of the Peace concluded and agreed on between King Philip and Antiochus, recites this, That all Prisoners taken on either side (the Eolians only excepted) should be set at liberty. Thus we read that Probus made Peace with the Vandals and Burgundians, upon this condition, That all the prey they had taken, together with the Prisoners should be restored. Nay sometimes it is agreed, That not only those Prisoners that belong to private men, but those that belong to the Commonwealth are to be discharged, as Thucydides testifieth. Now this is plainly evinced, as well by the subsequent reason, as by its opposite member, The Peace was concluded, and the Prisoners released, for, faith Zonaras, so it was agreed. It was then by virtue of the agreement, and not simply by their making of Peace, that their Captives were dismissed. So Pomponius, If the Captive concerning whom it was agreed in the Articles of the Peace, that he might return home, shall notwithstanding chuse to remain with the Enemy, he shall not afterwards claim this right of Poistliminy. So also Paulus, If a Prisoner taken in War when the Peace is made, shall fly away and come home, he shall be made to return back, to him, who in the War took him Prisoner; because in the Articles of Peace it was not mentioned, that the Prisoners should be released. Now the reason why the Romans seem'd fo to neglect their Prisoners, is because they would have them to place all their hopes of returning back in their value, rather than in a Peace. For thus doth Livy testifie of them, That Rome was a City, that of old was in Captives minime indulgent, very regardless of their Captives. But this reason being proper only to the Romans, could not of itself confite the Law of Nations; it might notwithstanding serve as one caufe amongst others, for which the Romans did the more willingly embrace that Law which was before introduced by other Nations. But a truer reason may be this, because all Princes and States making War would willingly be believed that there Caufe was jufj; and on the contrary, that they that took Arms against them did the wrong. Now whilst both parties are thus perswaded, it would not be safe for any other Prince or State that would live in peace to judge between them; therefore they conclude it better to fit still, and to esteem whatsoever should be done in that War to be jufj, and so the Prisoners on either side taken in actual Armies to be lawfully taken. But now against those Prisoners, that have been by misfortune surprized through the suddain eruption of the War, no such thing can be allledged; for they have neither advised nor attempted
attempted any hurt to us. Nevertheless to weaken the power of the enemy, because possible it is that they might be inticed to injure us, it hath been thought not unjust to detain them during the War; but the War being ended, there can be nothing allledged why they should not be released: and therefore it is generally confented unto by all Nations, That such Prisoners, when the Peace is made, should be enlarged, as being confett by both parties innocent. But as to other Prisoners, every man that upurs a Right over them, is willing that he should be believed that he hath justly gained them, unless by some preceding Agreements he be limited. And for this Cause neither Captives nor any thing else taken in War, is to be restored in Peace, unless it be so express in the Articles of Peace, because the Conquest would be thought to have a Just Title to them, which to contradict, were to renew the War: and therefore Taritas in Prosopius charges Pelagius, who was sent unto him from the Romans, that he should not mention the releasing of the Sicilian Captives; urging that it was not equitable that the Romans should deliver their Fellow-Souldiers to their old Masters. Wherefore the Agreement brought by Quintilian in the behalf of the Thebans, is rather witty than solid, namely, That Prisoners if they can make their escape into their own Country, the War being ended, are to be reckoned as Freeman; because what is gotten by force, is no longer ours than we can keep it by force. Concerning those that make their escapes after the Peace is concluded, we have hitherto treated: now in the time of War they are said to return by Postiminy to their former freedom, who were free before they were taken Captive in the War; but they are said to be received, who before were not free, as Servants and other things.

He that was a Free-man returns so by this Right, in cafe he return to this purpose, That he may follow the Fortune of that City whereunto he returns, as Trophonius delivers it; because, as the Servant that is to be made free, ought first to be sicut juris, of and for himself, that so his act may be voluntary: so he that would be admitted as a Citizen after captivity, must resolve to incorporate himself with that City, and become one with it, or as a Member of it. Moreover, Whether the Captive be retaken by force of Armes, or whether he have made his escape by fraud, it is all one, as Fleuretius observes; and the Case is the same if he be freely dismissed by the Enemy. But what if he be fold by way of Contract to another, and that he thence escape into his own Country? This Question is handled by Seneca in his Controversie concerning the Olyntians, whom Parbaphus bought. For when the Decree was pass'd by the Athenians, whereby it was ordained, That the Olyntians should be free, he made this doubt, Whether by that Decree it was meant that they might be made free; or that they were adjudged thereby to be free: which latter opinion was the truest. Thus Chidubius in Prosopius pleaded, That being returned into his own Country, he was by the Law thenceforth a free man.

But a Freeman being returned home, doth not only recover his own freedom, but all things else that were his in any Nation that is at peace, whether they are things corporeal or incorporeal; because, though people that are at peace, as they do not enquire into the justnes of the War, but take every thing that is done to the Captive to be just: so when they fee the Captive to be at liberty, they dispute not the manner bow, but take it as granted that he was releas'd justly, whereby they slew themselves indifferent to both parties. Wherefore he that by the Law of Arms is polish'd of a Captive, hath not an absolute and indubitable Right unto all things that belong to him. For it is possible that his right may furceafe without or against his will, that if the Prisoner can make his escape, and return into his own Country; for then juft asos he lost his right to the Man, doth he lose his title to those Goods which were his. But what if those Goods be alienated, Whether shall he that derived his title to them from him who at that time was by the right of War the Owner of them, be defended by the Law of Nations, or shall the same thing so alienated be recovered? Those Goods, I mean, that arc extant among such people as June Neuters in the War. Here then we are to dilupung inbetween such things as may return by Postiminy, and such as are incapable of this right; the difference whereof we shall presently explain. That the former may appear to be alienated during their Caufe only, and under this Condition, That the perfon be still held in custody: thefe latter, simply and absolutely. By things alienated, I understand even those things that are given or received. As he that returns home hath a Right unto all things by the Law, that were his before he was taken; so are the Laws in force against him as fully as if he had never been under the power of the Enemy.

But unto this Rule, as it concerns such as are Freeman, Paulus allows of this exception, Postimino aequent, qui armi uultis hujus vis deradant; They that being conquered by Arms had yielded themselves up to the will of their enemies, have no benefit by their return home. The reason whereof is, because all agreements with enemies are, by the Law of Nations, to be obvioue, as we shall shew anon. Neither is this Right of Postiminy to be admitted against those agreements; and therefore those Romans in Collins, who being taken by the Carthaginians,
Carthaginians, and sent back to Rome to procure exchanges, did acknowledge, That the Right of Poftliminy was not due unto them, because they were bound by Oath to return. From whence alfo it is rightly oberved by Paulus, That during the time of a truce there is no Right claimed by Poftliminy; yet Modofimus is of opinion, That if they that delivered themselves up to their enemies were bound by no Covenant or Promife made, they might be admitted to their freedom by Poftliminy.

That which hath been said of particular persons, may alfo be said of Cities and people, That if they were free they may recover their freedom. If the power of their Friends and Associates be able by force of Arms to releafe them from the power of their enemies. But if the very Body of the people that confifted that City be difloved, I believe that they that fucceed are not to be accounted the fame people; neither are thofe things that formerly belonged to that City to be reftored unto them by this Right of Poftliminy, according to the Right of Nations; becaufe a Nation, like a Ship, by the diflofution of its parts, doth absolutely perifl: for that its whole Nature confifts in the perfecul Conjunction of all its Members. Wherefore it was not the fame City of Saguntum, though the place where it formerly stood were reftored unto the ancient Inhabitants eight years after its diflofution. Neither was Thebes the fame City after that Alexander had fold the Citizeens for Slaves: whence it folloWS, That what the Theflians owed unto the Thebans before fuch diflofution, could not juftly be claimed by thofe Thebans by Poftliminy; and that for a double reafon, firft, becaufe they were then a new people; fecoundly, becaufe Alexander whilft he was Lord over them, had a power to alienate that Right, and accordingly had done it: and laftly, A Debt is not to be reckoned among thofe things which return by Poftliminy. Not much unlike to what we have faid concerning Cities, is that which the ancient Roman Laws concluded of Marriages, namely, That they were by captivity difloved, neither could they be reftored by poftliminy, but muft be rediftributed by the firft confent of both parties. But it is otherwife among Christians, witnefs that of Pope Leo unto Nicetas, Bifhop of Aquileia, concerning fuch Marriages, namely, That as in Slaves or Fields, or even in Houses and Poftliminies, the right and title of them is prefervd for thofe that are Captives, fo in fuch fhall return out of captivity, so alfo in Wedlock, if either party be married to another, let them be reformed. See what Hummor hath written to this purpofe in his Tract concerning the Divorce of Lolliarius and Terberga, to the thirteenth Interrogatory; and the Anfwer of Pope Stephen, in the feventeenth Tome and nineteenth Chapter of the Councils of France.

By what hath been already faid, it is no hard matter to understand what manner of right by the Law of Nations, Poftliminy gives to free men. Moreover, this very fame right may by the Civil Law, fo far as it belongs to things agitated within the City, be both restrained by adding fome exceptions or conditions, and alfo enlarged unto other profits and advantages, as occafion serves. As by the Roman Civil Law Fugitives are exempted out of the number of thofe that were capable of this right; fo were alfo the Sons of a Family, over whom the Father was conceived not to have loft that Paternal power and authority which was peculiar to the Romans; and that for this reafon, as Paulus obferves, becaufe to Roman Parents their Military Discipline was ever dearer than their own Children, whereunto agrees that which Cicero records of Mancius, That he ftirred up the Discipline of the Roman Empire, though to his own grief, that fo he might the better provide for the Safety of the City, wherein was also bound up his own; which made him prefer the Severius Right of Majefly, which was then in himself, before the bonds of Nature, or the tenderness of a Father towards his own Son. Again, a little diminution of this Right of Poftliminy, is that which was ordained, firft, by the Athenians, and afterwards by the Romans, namely, Quo redemptus est ab officiis, Redemptori servius donec premium reddiderit; That he that was redeemed, fhould ferve his Redeemer until he fhould have repaid his ransome. But this was made in favour to the poor Captives, left if there fhould be no provision made for the recovery of the money to paid, many Prifoners fhould have been left in perpetual flavery among their enemies. But yet even this very flavery was many ways mitigated by the Roman Laws, and at length by the Law of poftliminy, it was limited to five years service; neither could the money paid for his redemption be recoverable after the death of the party redeemed. So alfo by any Contraét of Marriage between the perfon redeemed, and the perfon redeeming, it was adjudged to be forgiven. So if it were a Woman that was redeemed, if the Redeemer did prostitute her Body, the ransome was loft. There were many other Laws made among the Romans in favour to thofe that would redeem Prifoners, and to punish their Kinflmen for neglecting them. Again, this Right of Poftliminy was by the Civil Law much enlarged, in that not only thofe Rights in Poftliminy which are allowed of by the Law of Nations, are granted unto him that fo returns; but generally all things and all Rights are as intirely his, as if he had never been within the power of the enemy. And this was alfo the Attick Law: for as we read in Dion Perieotis. A certain man pretending to be the Son of Caius, who had been taken Prifoner in the Slaughter at

Auctibus,


Acathus, and, as he said, been kept as a Prisoner in Thrace, when he had made his escape to Athens, claimed by Postliminy his inheritance from those that then had the postliminy thereof after his Father; we do not read that any thing was pleaded against his Right, only it came in ilue, Whether he were the Son of Callius, or not. The same Author likewise relates, That the Meffenians after long captivity, at length returning, received both their liberty and Country. Yea, and those things which either by ulcupation or redemption seemed to be taken away out of the Goods, or through dilute, to be deferved, are all of them recovered by a Recifilory Action. For under the Edict of making restitution to Ancestors, he also who is under the power of Enemies, is comprehended. Nay farther, the Cornelian Law provides for the Heirs of such as dye in captivity, and conserves all their Goods as lawfully as if he that returned not, were at that time when he was taken, dead. Now were it not for the Civil Laws, without doubt as soon as any man were taken Prisoner by the enemy, his Goods would presently be theirs that had them in possession; because, Qui apud hostem est, pro nullo habetur; He that is under the enemies power is held for none. And then, if he that was taken should return, he should receive nothing but such things as by the Law of Nations were due unto him by Postliminy. But that the Goods of a Captive were confiscate and brought into the Treaury, in case he had no Heir, was a Law peculiar to the Romans only. Hitherto we have treated of things that return, now we shall speak of such things as are received by Postliminy.

Amongst which, in the first place, are Bondmen and Bondwomen, yea even such oftentimes as have been alienated, and such as have been set at liberty by the enemy; because (as it is very well noted by Tryphonius) it is not just that his former Master being our Citizen, should be damnedified by the Right of an Enemy. By an Edict of King Theodoric it was ordained, That Servants and Tenants being taken by the enemy, and returning home, should be restored to their own Lords, if they were not before bought by some other from the enemy by way of traffic. But by the wife Gothick Law, a Servant recovered by War was restored to his Master, he paying unto him that took him the third part of his just price. But in case the Servant were sold by the Enemy, then was the Lord to pay the full price for which he was sold with some advantage. Therefore that a Servant may be capable of reception, it is necessary that his old Master should be either actually possess of him, or at least that the Servant be where he may easilly have him, if he so pleaseth. And therefore whereas in other things it may suffice, That they are brought within the Bounds of our own Territories, this is not sufficient in a Servant to receive the right of Postliminy, unless it be also made known to his Master that he is there. For as Paulus faith, If he lye sculling in Rome, and will not be seen nor known to be there, he is not yet received by this Law. And as herein Servants differ from things inanimate, do they from the cafe of a Freeman in this, That it is not required in them to make them capable of being received, that they should return with an intent to follow the fortune of the City whereunto they return; for this is required from him only that is to receive his own freedom, and not of him that is to be received by another. For every man hath a free power to make himself a Member of what City he pleaseth, but not of the Right of Dominion. Neither do the Roman Laws exempt Fugitive Servants from this right of reception: for even in these may their old Masters claim their Right, as Paulus notes; Jeff if we should admit the contrary, it should prove injurious not to the Servant, who evertheless is still to remain a Servant, but to the Master who would want his service. But generally, concerning such Captives as are redeemed by the valour of Souldiers, that may be truly said by their Generals, which some would so well, as if it were meant of all things, Receptas eos non captas judicare debemus, & Multum nautor fere formarem eosum declar effe non dominum; We are to esteem these as not taken, but received, whom we ought rather to defend and protect, than insult over. Those Captives that are ransomed from the enemy, are by the Roman Laws theirs that redeem them; but the Summ paid being tendered, they are understood to be by Postliminy received. But by the more recent Laws some things have been changed; and that Servants being taken may be encouraged to return, they now propose present liberty to such as have been maimed in their service, and to the rest after five years, as appears by their Military Laws, collected by Rufus.

But unto us (that are Dutch-men) this Question is more pertinent, Whether those people that were once subjected to the power of another Prince, may return back to their former State and condition; which will admit of a Dispute, in cafe not he who the Empire had been, but some other of their Associates, had recovered them from the enemy, whereunto the fame Answer, I conceive, may serve that was before given concerning Servants, unlesse by some Social League it be otherwise agreed.

Among things that are received by this Right of Postliminy, the first that offer themselves are Lands; whereof Pomponius speaks thus, Expulsis Hostibus ex Agris quae cepserant, Domina eorum ad priores Dominos reditum; The Enemy being driven out, the Lands return to their former Owners. Now the Enemy is then said to be driven out, when it

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appears
appears plainly that they are not able to recover it again. Thus the Island E'gina which the Lacedemonians took from the Athenians, they restored to their Associates who were the Ancient Lords thereof. And the Goths and Vandals being expelled; jiufifian, and the Emperor being succeding, restored the Lands unto the Heirs of those who anciently poifted it, notwithstanding those prescriptions which in other cases the Roman Laws did admit of against them. The very fame was confirmed by a Law made by Hononius, who though Spain had been in the polifhion of the Vandals for Three hundred Years, yet would not permit that any preftcription should be pleaded in Barr against the Ancient occupants, as Procopius tells us; which Law we find alfo recited in the Council of Seld, where this is added as the reason, Non enim erit obliquenda praefcripto tempore, ubi necessitas intereft hibitastis; For no preftcription of time is to be pleaded which is enforced by open hoffity. Now look what Right they have to the Lands, the fame also they have to every thing that is affixt to the foil; for even tho' places, which had been formerly held as Sacred or Religious, being taken by Enemies if they do efcape that calamity; they alfo as if returned by a kind of Poftliminy, shall be restored to their former condition, as Pomponius notes. Wherewith agrees that of Cicero concerning Diana in Segesta, p. Africani viritae Religionem simul cum loco recuperavit; By the valuation of Scipio Africanus, Diana recovered both her Temple and worship: wherefore the fruits and profits of the ground thus received, are likewise to be restored, according to what Pomponius writes concerning Lands hift drowned, and afterwards recovered. So in Spain it is provided by a Law, that as well the honour and dignity, as all the hereditary jurisdictions thereunto belonging, may return by Poftliminy; the greater at any time, the lefer if claim be laid unto them within four Years after their reception, unless it be some fort strong, which if lost and recovered again is the Kings.

Concerning moveables the general rule is quite contrary; for they do not return by Poftliminy, but are utterly lost, as being lawful prize, and may therefore be bought and sold; whereofever they are found, they are adjudged his that bought them: neither hath the first owner any Right at all to them, though he find them either abroad among Neuters, or at home in his own Country. But from this general rule we find, that in Ancient times, such things as were of ufe in War, were excepted; which seems to be agreed unto by the Nations for this reason, that the hopes of recovering such things to themselves, might render them the more cheerful and industrious in regaining them. For the Laws of most Cities in those times were made for the encouragement of valour, and in favour to military affairs, wherefore their content was easily gained. What things were accounted ufeful in War we have already summed up out of Gallus Elius, but we find them more accurately set down, as well by Cicero in his Topicks, as by Medeillus: As, namely, Ships that are long and fit for burden, but not fuch as are made for plea-fure; Males, but fuch as are accustomed to the Pack-Saddle; Horfes and Marcs, but fuch as will abide the bit, and are fit for service: Armes alfo and Apparel are of necessary ufe in War, but these do not return by Poftliminy; because they were thought to merit no favour at all, who would suffer their Weapons and Garments to be taken from them: nay, it was accounted as a crime that deferved punishment, as may every where appear in Histories. And herein we may obferve the difference they made between Horfes and Armes; the one being capable of reception, the other not; because poftible it was that an Horfe may break loose of himself, and so fall within the Enemies power, without any default of his Rider, but fo could not Arms. And this difference between moveables seems to have continued in ufe from the Goths until Bettius li-ved, who expounding Cicero's Topicks, seems to speak of this Right, as if it were in force at that Day.

But in these latter times, if not before, this difference is taken away; for now no moveables do return by Poftliminy, as hath been observed by those who are most expert in the Civils of Nations; and the fame Custome is for Ships, as we may perceive in many places.

But tho' things, which though taken by the Enemy, yet were never within their Gar-risons, have no need of Poftliminy: because by the Law of Nations, the owner never lost his property in them: the like may be said of fuch things as are taken by Thieves and Pyrates; because (as Ulpian and Juvfinus anfwer) the Law of Nations never granted unto them a power to alter the property of what they got: upon which ground it was, that the Athenians were willing to accept of the Island Helos, which some Pyrates had taken from them, as King Philip did from thofe Pyrates, as of a thing restored by Philip; but not as of a thing given them, as will appear by the very Epiftle of King Phil- lip recorded by Demofthenes. And therefore things fo taken, wherever they are found may be claimed, only (what out of equity we have already concluded to be juft) so much ought to be allowed him, who at his own charge hath pofted himself of them, as may be conceived, it would have cost the first owners themselves to have recovered them.

Now
Now though it be thus by the Law of Nations, yet may the Civil Law otherwise determine it; as in Spain, the Ships that are taken from Pyrates are theirs that take them; so also they are among the Venetians. Neither is it unaccountable that a private thing should give way to publick profit, especially where the recovery of them must necessarily be accompanied with so much difficulty. But yet this Law can be no Plea against Strangers, who may notwithstanding challenge their own things.

But that which is more to be admired, is that which the Roman Laws do telstifc, namely, That this Right of Postliminy took place, not only between enemies, but even between the Romans and Strangers. But surely this, as I said elsewhere, was but a Relic of that barbarous Age, wherein the general corruption of mens manners had taken away all sense of that natural Society that should be between all Mankind: and therefore among Nations that had no publick War one against another, there was practiced among private men a certain licence of War, which their different language and manners seemed to denote; which licence, that it might not swell so high as to kill each other, it pleased the Nations to limit, and to agree, That they that were taken on either side, being Strangers, should be held as Slaves; and consequently they introduced the Law of Postliminy, which puts a difference between Strangers and Robbers or Pyrates; because Strangers do usually agree upon equal Conditions, which Pyrates and Robbers disdain. It seems that of old it hath been a Cate much controverted. Whether if the Subjects of a Confederate Nation, being Slaves here, should escape from us and get home, They may be said to return by Postliminy. This Question we find propofed by Caesar, concerning which Gaius Albinus delivers his opinion thus, We, faith he, obferve the fame Right of Postliminy with a free people, with Confederates and with Kings, as we do with Enemies. But Proculius’s opinion was quite contrary, I doubt not, faith he, but that both our Confederates, and they that are a free Nation, are all Strangers unto us; between them and us there is no Postliminy. We are therefore to distinguish Leagues for if any Leagues be made on purpose only to put an end, or to prevent open War, those Leagues do not for the time to come hinder either the taking of Prisoners, or the Right of Postliminy. But if in the Articles of the League it be expreft, That the Subjects of either Nation may upon the publick Faith safely travel or fiojourn in the others Dominions, then it is not lawful to take Prisoners on either side, and fo there is no place for Postliminy. And this I take to be the meaning of Pomponius, where he faith, If there be a Nation with whom we have neither friendship nor hospitality nor League made for friendships fake; thefe indeed are not enemies: But yet whatsoever of ours comes to them is theirs; and a man that is free with us, being taken by them, is made their Slave: and it is the fame if any thing come from them to us, and therefore in this cafe Postliminy is granted. In mentioning a League made upon the account of friendship, he fhefs that there may be Leagues that have no Right either of friendship or hospitality. And Proculius sufficiently declares, That by a people confederated, he understand such a people as had promifed friendship and fafe hospitality, where he fubjoined thefe words, For what need is there of Postliminy between us and them, when they may equally retain as well their own liberty as property in their own things with us, as they do among themselves: and we may enjoy the fame liberty and dominion with them as with our felves. Wherefore that which follows in Gaius Albinus, namely, With thofe Nations that are under our Jurifdiction, there is no Postliminy is to be understood with this fuppement: nor with thofe with whom we have contracted any League of friendship.

But in our days, not only amongst Christians, but even amongst Mahometans, this Right of Captivity without the time of War. as also that of postliminy, are worn out of use. The necessity of both being taken away by virtue of that cognition or affinity wherein Nature hath linked us, which is now re-acknowledged to be between all Mankind. Yet may that ancient Right of Nations be now in force, in case we have to do with any Nation fo barbarous as to conceive it lawful for them to invade in an hostile manner the perfons and properties of all Strangers without any provocation or denouncing of War. And even whilst I am writing this, thus it is adjudged in the High Court of Paris, Nicholas Verdunis being President, That the Goods which have been the Subjects of France, but were afterwards taken by the Pyrates of Argier, who live upon the spoil of all that traffick by Sea, were by the Right of War justly alienated; and therefore being recovered by others, were theirs that recovered them. And in the fame Court this also was adjudged, which I faid even now, That Ships are not to be at this day reckoned among the number of those things that are received by Postliminy.
C H A P. X.

Admonitions concerning things done in an unjust War.

I. If what sense modesty may be said to forbid what Law permits.

II. This applied to such things as are permitted by the Law of Nations.

III. In an unjust War, what the Law of Arms permits are internally unjust.

IV. Who are hereby obliged to make restitution, and how far.

V. Whether things taken in such a War, are to be restored by him that took them;

VI. Or by him that knowingly does detain them.

I. Modesty forbids what the Law permits.

AM now to look back, and to take away from those that make War almost all those Rights which I may be thought to have granted them, though indeed I have not. For when I began to explain this part of the Law of Nations, I also declared, That many things were said to be right and lawful, because they were not punishable by Law, partly because they derive their authority from Military Councils, which notwithstanding either swell beyond the Bounds of honesty, whether we confine it to Right strictly taken, or place it in the Precepts of other Vertues; or else they are such as may more religiously, and amongst good men, more commendably be left undone. Seneca brings in Pyrhus pleading thus,

💡 Lex nulla capto parcit, aut penam impedit.

No Law spares Slaves, nor them from stripes defends.

To whom Agamemnon replies,

💡 Quod non vetat Lex, hoc vetat sibi pudor.

What Law forbids not, Modesty commends.

For the word Pudor in this place respects not so much a man's fame and reputation, as what is in itself right and honest; or at least what is better and more laudable than that which the Law permits. Thus we read in Justinian's Institutions, Things are said to be committed to a man's trust, when they have no tye of the Law to secure them, but the honesty and integrity of the person entrusted; So in Quintilian the Father, The Creditor cannot with any honesty or conscience require his Debt of the Surety, unless it be when he cannot get it from the Principal; and in this sense we find that Pudor and Justitia, Equity and Justice, are very often conjoined.

💡 Nondum justitiam facinus mortale fugaris.

💡 Ultima de Speris illa reliquie humana.

💡 Præque metu populum sine sp er pudor ipse vegebatur.

Justice as yet did amongst Mortals dwell,
She was the last that bid the Earth farewell.

💡 Twas shame, not force, that then the people aw'd.

Plate calls Justice the Companion of modesty; and in another place he tells us, That God fearing the destruction of mankind, had sent Equity and Justice amongst men, as Ornaments to Cities, and as Bonds to contract Love and friendship between them. Plutarch also in the life of Theseus terms Justice an Inmate or Cohabitant with Righteousness. And in another place he joins them together as Companions. But Cicero assigns them their distinct Bounds, saying, It is the Duty of Justice not to hurt our Neighbour, but of Modesty not to offend him; Justitia est non violare homines, Vercundia non offendere. With that Verfe above quoted of Seneca agrees that of the same Seneca in his Philosophy, Quam angusta est innocencia ad legem homines eft? How scant is that innocency that is measured by the Law only? Justice and faithfulness require such things of us as no Law can oblige us unto. Where we may observe that he puts a difference between just and Justitia, attributing to the former that which the Law enjoins, but unto the latter that which right reason and conscience dictates. Of how much larger extent are the Bounds of our Duty one to another, than what is contained within the Hedge of the Law? How many things do piety, humanity, liberality, justice and fidelity require of
Cautions but And as Aquifine, repugnant something, That what but fione for all for as an 49 i.e. juft.) which looking themfelves that are included though they are, that is to fay, that which comes here to be defirous, faith he, is not what I have done against the Syracofants; for what ever I have done againft them as enemys, the Law of Armes will juftifie me in it; but what they men, being overcome, ought in reafon and equity to fuffer. Ariiffic defcribing this Quifion, Whether Captivity arizing from War be juft, seems to owe this diftinction, Some (faith he) looking only at that which the Law permits (for the Law it elfe alo is fomething that is juft) doth d. Captivity in War is juft; but yet they deny it to be fo abfolute, becaufe it is the caufe of that War may be unjust. Others there are, faith Seneca, that create themselves as Right by Arms in another Territories: where these two words [A Right, and in another Territories] do feem no lefs to claff than the Arms whereby that Right was got. But that is there called Right which the Law of Nations permits only. Confonant whereunto is that of Timocydes in that Oration which the Thebans made to the Roman Senate, As for thefe, faith he, that were flain during the Carfift, we complain not; for this was in fome fort juft. Nay, the very Reafon thefe Lawyers themselves do often call That the Right of Captivity, which in another place they term an injury, and place it in opofition to naturall quiety. And Seneca, refpeéting that which often falls out (namely, when the War is unjust) account the very name of Slave as a badge of injustice. The Italians in Ifey, detaining from the Syracufians that which they had gained by War, are faid to be obfinate in the determination of that which they had gained unjustly. And Dion Prufleens, having declared fuch Captives free as could make their ecape home, adds this, As being unjustly brought under bondage. So Lactantius observes, That the Philosophers in all their Disccufions concerning Military Affairs, alwais fettled their Orations rather to the publick customs of the Age they lived in, than to justice and true value. And St Augustine in an Epiftle of his to Marcellinus, tells him, That if in this World the Precepts of Christianity were duly kept, no War could be made without fonie mercy. And in another place, Among the true Worshippers of God, even their very Wars are peaceable.

We conclude therefore in the firft place, That the ground of the War being unjust, al though it be folemly undertaken as to the manner, yet are all thefe acts that are done in it unjust, if we underfland injustice, not as it is repugnant to the Law of Arms; but accor ding to its natural acception, as it is repugnant to right reafon, equity and confience. So they that shall knowingly either commit fuch acts, or affift in the doing of them, are included in the number of thofe, who without repentance cannot enter into the Kingdom of Heaven: for repentance, if true, neceffarily requires from fuch as have time and fuffici ent, That he that hath done wrong, either by killing men, spoiling Goods, driving away Cattle, or the like, fhould make fatisfaction. And therefore did God himfelf renounce the follem Feasts of the hypocrifical Jews, because they did not fuffer their Captives unjustly ra cen to go free. And the King of Niffbol proclaimed a Faft throughout the City, and commanded all his Subjects to turn every one from his evil way, and to emptie their hands from all things got by rapine and violence; as being by the very diftances of natu ral reafon taught to acknowledge, That without refituation all their humiliations were but vain and fic tious. Now Nifforum ations fementia, si non reddatur universa; Vengeance will not be long de layed, unless refituation be made to the full, faith Hierome: with whom agrees St Augustine, If that wherein we have finned be not reftored, being in our power, we do not repent, but diffem ble. Neither is this the judgment of Jews and Chriftians only, but of the Mahometans alfo, as Laurelinus informs us.
Cautions when Town, but were themselfs de 5.

Now they that are obliged to make restitution, according to what we have elsewhere delivered in general, are in the first place the Authors of the War, whether as having the supreme power, or as counselling and persuading thereunto; and these are bound to make satisfaction as well for all damages that are usually done in War; as also for all those unjustly done, if they were done by their either order or persuasion, or by their permission, in case it were in their power to have hindered it. Thus also are Captains bound to make restitution for those things that are either spoiled, or taken away by any under their Command; yea, and the whole Army in general, that shall run headlong to any one common outrage, as to fire a Town, or the like; and for particular acts, every particular Soldier shall satisfy for that loss whereof he was the Author, either solitary, or concurrent with others.

Neither may we herein admit of that exception which by some is brought of such as are only Auxiliaries, if they be any ways guilty of the crime; To oblige any man to restitution without guilt, the bare crime sufficeth. Some also are of opinion that though the War be never fe unjust, yet the things taken in it are not to be restored; because, both Parties, when the War began, were presumed to agree to this, That their Goods should be theirs that could take them. But on the contrary, it cannot easily be granted that any man will readily give away his Right; and the nature of War is much different from that of Contracts. But to the end that Nations being once at peace, should reft, and not involve themselves in endless War against their will, it was thought sufficient to introduce this external Right of Dominion, whereof we have already spoken, which notwithstanding may very well confit with that internal obligation to restitution. Nay, these very Authors seem to affert as much in their Discourses concerning the Right of taking Prisoners; whereas the Samnites in Livy declare, That the spoil which they had taken from their Enemies, and which by the Law of Arms seemed to be theirs, they had restored: Which, he faith, seemed to be theirs, because the very Samnites themselves had before acknowledged that War to have been unjust. Not much unlike is that power which the Law of Nations gives in a Contract made without fraud, wherein there is some inequality to compel the Contractor to fulfill his Contract; yet nevertheless he that receives more in value than what he gives, is bound, though not by Law yet, in honesty and confidence, to even the balance by reducing the Contract to an equality.

Ye further, as though the damage be not done by our selves, or if it be without any fault of ours; yet if the thing taken away in an unjust War by another, be in our possession, we are bound to restore it; because there can be no reason given naturally just, why the right Owner should be deprived of it: for he never contended to its alienation, nor was their any crime committed by him, nor did he receive any recompence for it; apposite whereunto is that of Valerius Maximus, The people of Rome, faith he, when Claudius had publicly sold some Camerine Prisoners taken in the War, although they saw their Treasures thereby filled, and their Empire enlarged; yet being convinced, That their General had not dealt very faithfully in their Conquest, they with great diligence bought out those Captives, and redeeming them, restored them unto their Lands. So also is that which Josephus records of Mark Anthony, who commanded the Tyrians to restore to the Jews those Parts of Judea, which they withheld from them, to releafe their Prisoners, and to return the spoil to the right Owners. Thus we may read of the Phocians, That by the Decree of the Roman Senate, even their publick liberty, together with their Lands formerly taken from them, were restored. So likewise were the Lygurians foold by M. Pompilius, but redeemed by the Romans, and, together with their Goods, set at liberty. The self same Decree paft for the Abderites, the reason being added, Because the War made against them was unjust. Thus M. Claudius released all the Parthian Prisoners, and restored all the spoil, Because the Romans had unjustly broken the peace. And Mahemer the Turk dismission upon this account, all the Captives taken at Samia Maria in Achaia. Yet may the present Possessor of such Goods or Persons deduct so much for his either charge or labour, as in probability it would have cost the right Owner to have recovered them: but if he who without any default was thus possesse of any thing so taken, hath either confummed or alienated it; he is not bound to make any farther satisfaction, than he shall be thought to have been made the richer thereby.
CHAP. XI.

Moderation to be used in killing of men in a Just War.

I. That some acts in a just War are not internally just: explained.

II. According to internal justice who may be killed.

III. That no man can be justly slain for his misfortunes, as they that are forced to either party.

IV. Nor for faults intermediate between mischances and mischiefs: this explained.

V. The principal Authors of a War, distinguished from those that are drawn into it.

VI. In the Authors we are to distinguish of the Causes, whether probable or improbable.

VII. Even to those who have deferved death, the punishment may sometimes be justly remitted.

VIII. Care should be taken of the innocent, that they be not unadvisedly killed.

IX. Infants to be spared, and Women if not highly criminal, and old Men.

X. Priests to be spared, and such as add to themselves wholly to learning.

XI. As also Husbandmen.

XII. Merchants, and such like.

XIII. And slaves.

XIV. And such as surrender upon equal conditions.

XV. They also that deliver themselves up without conditions.

XVI. All these may be admitted to mercy, unless they be very criminal, which how to be taken.

XVII. A multitude of offenders may well be spared.

XVIII. Hostages, unless in themselves faulty, are not to be slain.

XIX. That all unprofitable Combs are to be avoided.

Neither is that generally true that is commonly said,

He hazards all, who what is just denies.

That of Cicero is much better, there are some good offices to be performed, even to those who have injured us; there is also some moderation to be used even in revenge and punishments. And even in the sharpest War, there ought to be some grains of mildness and clemency, if it be regulated according to Christian Discipline. Nay the very Philosopher hath already pronounced them cruel, who though they have cause, yet know no measure in punishing. Cicero commends that golden age of the Roman Empire, the end of whole Wars were mild and gentle, and never otherwise but upon necessity. Aristotle notes, that the punishment taken on the Thebans and Heracleans, favoured more of cruelty than equity. And Thucydides speaks of some, that suffered punishments greater than what were fit. So Tacitus taxeth Pompey, for exacting punishments for greater than the crimes deserved. And in the same Book he blames Aug. Cesar, that in punishing Adulteries he was more cruel than any of his Ancestors; yea, oft-times than his own Laws. Although as Juvenal speaks in this Case:

____________________________
Extigit autem
Interdum ille dolor plus quam lex uale dolore
Concessit.
____________________________

This Grief sometimes far greater licence pleads, Than any Law to other grief concedes.

So Quintilian, A punishment beyond what is humane, is not to be exacted from any, unless it be from the very worst of Parricides. And therefore M. Antoninus the Emperor did well when he wrote to the Senate, To be careful that their proscriptions were not too severe, nor their punishments too cruel. Whereof Ammianus likewise complains, Their rage against many was much greater, than either their errors or crimes deserved. It is possible, that Aristides, that they take revenge for an injury done to themselves, may be unjust, if they should exceed in measure; for he that in this case, proceeds beyond his just bounds, is the Author of a new quarrel. And he that puniseth a Malefactor beyond what he hath deserved, deserves himself to be punished. This was Ovid's opinion of a King:

____________________________
Cade nocecentum
Si nimis ulecent extitit ipse nocens.
____________________________
He that for Blood too great revenge doth take,
Doth (sure) himself the greatest Murther make.

The Platæans in Isocrates demand, Whether it be fit or reasonable, to require for so small faults, so great and grievous punishment. And in his second Oration for Peace, the fame Aristides gives this wholesome advice, Look not so much at the crimes, as at the persons to be punished; and at your own frailty and propensity to fall, that are about to punish: and lastly, at the measure how far you may with equity punish. Minos in Propædeus is highly commended in that,

Victor erat quandiu aquis in hoste suit.

Though Victor he even to his foes was just.

So he in Ovid, who,

In giving Laws to's Captives was most just.

But when we may justly kill our Enemies in a just War, according to that which we call internal justice, and when we may not, may easily be underslood by what we have already said in the first Chapter of this Book. One man may be said to kill another, either accidentally or purposely; no man may justly be killed purposely, unless it be for some crime that deserves Death, or because we cannot otherwise defend our own lives or fortunes: And although to take away the life of a man, for things of small value, do not swire from the rules of justice strictly taken; yet it doth from the rules of Charity. Now that the punishment may be just, it is necessary that he that is killed should offend, and that in so high a measure, as that by the sentence of an upright Judge, he may be condemned to Death; whereof we shall now speak the les, because we have already sufficiently done it in the Chapter of Punishments.

Heretofore when we treated of Suppliants (for such there are as well in War as Peace) we distinguished between mistake and injustice. Glyppus the Lacedemonian, discoursing about the Right of Suppliants, states the Case thus; they who at the first introduced that Right, did certainly intend mercy and compassion to those whom fortune had made miserable; but as to such as were fallen into misery, through their own deceitful dealings, or out of a desire to supplant another mans Right, these have no reason to blame fortune, nor ought to asume unto themselves the name of Suppliants. Whence we may observe, That whereas there are two sorts of men, that usually cry for protection, they that are unfortunate, and they that are malefactors: Glyppus places the Athenians amongst the latter, because unprovoked by any injury, they made War upon the Syracusians; whereupon he infers, that since they voluntarily began the War, it was but just that they should feel the evil consequences that attended the War. Examples of such as are unfortunately miserable, are those who being no Enemies, are notwithstanding unhappily found, and thereby blocked up amongst Enemies, although they bear no malice against us: Such were the Athenians, when Aristion their Tyrant forced them to side with Mithridates against the Romans; of whom Paterculus writes thus, If any man shall impute that to the Athenians as an act of Rebellion, when being close besieged by Sulla, they were enforced by Aristion their Governor, to defend themselves and their City against him in favour to Mithridates, he will find himself mistaken, as well in the truth, as in the Ancient Historians; for the Athenians were so fast friends to the Romans, that at all times, and upon all occasions, whatsoever was faithfully performed, the Romans would usually say was done (vide Attica) with as much fidelity, as if done by the Athenians. Nevertheless being miserably oppress by the forces of Mithridates within, who held their City in despite of them, and straitly besieged by the Romans, their friends without, whilst their hearts were without their walls, they were compelled to keep their bodies within. The latter part of which sentence seems to have been borrowed from Livy, who speaking of Indibis, faith, That with his Body he served the Carthaginians, but with his mind the Romans. For as Cicero rightly observes, They who hold their lives at the mercy of others, do more confider their power what they may do, than their justice what they ought to do. So the same Cicero elsewhere, The third time was, faith he, when after the coming of Varus into Africk, he remained therewith, if it were a crime: Necessitatis non voluntatis fuit; It was rather inevitable than voluntary. And this very course took Julian in the case of the Aquileians, as Ammianus testifies; who when he had described the punishment of some few, adds, The residue be disfrant without any hurt done them: Quos in certaminum rarioe necessitas egereat, non voluntas; Who, faith he, fought more through compulsion, than by choice or election. Thus did this merciful Prince upon very equitable considerations. Thus also did
did Clem in Thucydides freely forgive them who being enforced by the enemy, did serve against him. So Peristius speaking of Latins and others, whom Commodus compelled to serve against him; They, faith he, obey Commodus with an unwilling mind; but whensoever they have a power and opportunity to serve us, they never wanted a will to do it. Necessity is a strong and violent thing, not to be refisted; wherefore Cæcins Clesius in Xiphilinus, treating concerning the affairs of the Emperor Severus, pleads thus, For my part, faith he, I never knew thee, nor yet Niger; but being unfortunately left in that part which he had obtained, I did what necessity urged me unto, and obeyed the present Power; not that I was willing to make War against thee, but that I was desirous to repel Julian for mine own safety. Thus also Aurelianis, when he made his entry into Antioch, set out a very gracious Proclamation, referring all that was done rather to an impulsive necessity, being over-awed by Zenobia, than to any enmity they bare unto him. And Belisarius in Procopius thus excuseth the Africans, That what they did was against their wills, being then under the power of the Vandals. So likewise Taulus told the Neapolitans, That he knew them to be under the Command of their Enemies unwillingly. An ancient Commentator upon that part of Thucydides, He disposed thence concerning the falling of the Corcyrean Captives, thus glosseth, He shewed therein a Princeely clemency, every way agreeable to the honour of the Grecians; for to kill men in cold blood is barbarous, especially Servants, who fight not upon their own choice, but at the command of their Masters. The Plataeans in Ilocrates do thus plead for themselves, We did not serve the Lacedemonians voluntarily, but by compulsion; for we durst not do otherwise. The same Plea doth he make for the other Grecians, Illorum partes Corpore separi se habebant, animo vero nobilitatem event. They were compelled with their bodies to serve the Lacedemonians, but their hearts were with us. So likewise of the Phocians Herodotus, That they followed the Medes, but by compulsion, not willingly. Upon which account Alexander forgave the Zeli, as Arrianus testifieth, Because they were enforced to take part against him with the Barbarians. And Diochlorus brings in Nicoclus the Syracusan thus pleading for the Captives, They that are Confederates with our Enemies, are by force driven to make War upon us; therefore, as it is just that they that sindiously and injudiciously make War against us, be severely punished; so to pardon those who unwillingly offend us, is alike conscientious. So Antigonus alledged, That he made War indeed against Cleomenes, but not against the Spartans, as Jaffiene reports it.

This also is to be observed, That between a plain and manifest injury, and an injury done by a mere mischance, there intercedes sometimes something of a middle nature, as if participating somewhat of either; so as the action is neither merely or altogether voluntary, nor yet done merely through ignorance or against our will. Aristotle calls these acts aμαιτητικα, slips or failings, as the Latines do trefpasse or offences. Of action, faith he, that are spontaneous, some are done deliberately, others rashly, and without consideration. Now whereas in humane Society injuries may be done three several ways; those done merely through ignorance are called mischances, as when a mischief lightens upon a man against whom no hurt was ever intended, (as for example, if a Son by forgetting open a Door should accidentally wound his own Father, whom he could not suspect to be behind;) or if a greater hurt or damage befal a man than what was intended, (as if a Fencer, for the tryal of skill, and only intending to draw blood, should kill his Adversary,) it might be called a mischance, but not a mischief. For whatsoever happeneth besides what a man proposeth to himself, it is to be attributed to misfortune: for happily vellicare voluit non vulnerare, He intended to beat him, not to wound him; or if he did intend to wound, yet haply not this man, but another; or it may not be in that manner, or so great a measure, as it fell out: if therefore such hurt or damage do arise, besides what was intended, or might probably be expected, it shall be esteemed as a mischance, not a mischief. But secondly, If the wrong done might have been foreseen and prevented, though it were not done improbably, with a wicked intention; it shall be accounted as a fault (αιτητα, as Aristotles terms it) for culpa affidit quicquid quin in se habet agendi principium, qui vero extra, intelix: He must needs be accersory to the sin or fault committed, that acts by a principle within him, but that he is passive and over-ruled by something without him, is unhappy. But when a man doth what he doth knowingly, though not deliberately, it is confessed that an injury is done; as he that in a Forest shoots at a Deer, but kills a man whom he saw not, is unfortunate: but he that discharges a Musket in a populous Street, though with no mischievous intention, yet if he kill a man, he sins; because he did it freely and voluntarily (though not deliberately): As also they that through anger, or any other perturbation of the mind, either natural or necessary, shall hurt a man, cannot be faultless; and yet we cannot account them wicked or malicious. But yet if a man should knowingly and premeditatedly do the same thing, he may justly be accounted wicked. Wherefore whatsoever is done, through anger suddenly, may very well be said to be unmeditatedly done; for it is not be that doth the wrong through anger that begins the fray, but he that first provokes that anger: Hence it is that before judgment in such Cases can be given, the Query is so much after the fact.
after the occasion, namely, who gave it, and how great the provocation was. For anger usually arises from hence, when a man thinks himself to be injured; and therefore in such differences as do arise about wrongs done through anger, the Question is not as in ordinary Contrasts, An hoc factum fit, Whether done or not; for therein, unless excited by forgetfulness, one of the Parties must of necessity be unjust; as namely, He that fulfils not the Contrast. But the Question should be, Whether the wrong done were unjustly done, considering the provocation. For be that first gave the occasion, did it knowingly; it is no marvel then if the one Party may think himself to be injured, and the other not, it may notwithstanding so happen, That he that through anger doth the wrong may be unjust; if, namely, the revenge swell higher than the provocation; or the wrong we do, bear not a just proportion with what we before suffered. For Justinus cft qui deliberat justit agit, He is a just man who knowingly and deliberately doth justly; for possible it is that a man may do unjustly knowingly, but not deliberately. Moreover, of such wrongs as are spontaneous, some deserve pardons, others not. Those injuries are pardonable which are done not only by such as know not but that they may lawfully do them. But these also that are done through ignorance, that is, when their ignorance is the cause of the offence. But if injuries be committed by ignorant persons, not through their ignorance, but with such an affection of mind as exceeds the common bounds of humanity, such Offenders deserve no pardon. Thus far Aristotle, whose very words, because the matter is of great use, I have therefore, faith Grotius, entirely turned into Latine, because usually being but ill translated, they are not easily understood, Quod sone non fit, omne dagnum vens; Whatever is unwillingly done, faith Dionysii Halicarnassensis, is pardonable. So likewise Proctorus, They who have wounded others, if through ignorance, that is, when their ignorance is the cause of the wrong, ought in equity to be forgiven by those whom they have wronged. Michael Ephesius interpreting that place of Aristotle, where he speaks of an injury that may be done beyond the expectation of him that did it, places that which I have before recited as an instance in a Son, who forcing open a Door wounds his own Father. And of that which might have beenforeseen, he puts that of a man that without any malice frequents an Arrow at random in an High-Way; and of that done by necessity, he instanceth in him who being oppreft with hunger or famine is constrained to be injurious to others to preferve himself; an example of faults committed out of natural perturbations, he puts in love, grief, fear. That is said to be done through ignorance when the Fact is unknown, as when Abimilech would have taken Sarah, not knowing that She was Abraham's Wife. An injury is said to be done by a perfon ignorant, but not through ignorance, where the Law is unknown. And this very ignorance of the Law is sometimes excusable, and sometimes inexcusable. All which do very well agree with what our Civilians tell us. Not unlike unto this is another place of the fame Aristotle, It is equity, faith he, that diftinguishes as well between manifest injuries and trespasses, as also between these trespasses and mischances. Whenever harm is done without an ill intention, and that could not be prevented, it is merely a mischief; that which might have been foreseen, yet is done without any purpose, is a fault or oversight: But what is done purposely, and with a wicked intent, is a manifest mischief; or an open injury, which deserves no pardon. The Ancients digested all wrongs done into three forms, as proceeding from either ignorance, imprudence, or wilfulness. And Homer in the laft of his Halds, speaking of Achilles, faith,—

\[\text{O\text{u}th \gamma \varepsilon \alpha \varepsilon \rho \omega \upsilon \upsilon \rho \varepsilon \alpha \psi \upsilon \omega \omega \sigma \nu \sigma \tau \nu \sigma \tau \nu \upsilon \omega \nu \lambda \upsilon \mu \nu \omega \nu,}\]

i.e. That he was neither ignorant, nor inconsiderable, nor mischievous. The like distinction also we find in Marcius, Dilinguisitur, aut proposito, aut callo, aut impetu; We commonly offend either purposely, or casually, or rashly: Purposely, as Thieves, whom Trade it is to rob and kill men for what they have, casually, as when a man in burning floods at a Deer, and kills a man; rashly, when men, being drunk with wine or anger, do unjustly fall out from words to blows. The first and last of these Cicero thus distinguisheth, In all acts of injustice, faith he, it is very considerable whether they be done by a too hasty eruption of passion, which unjustly lasts not long, and then ends in repentance, or by judgment and prudence. For what proceeds from the former are like Minstrels, hasty in their birth, and sudden in their fall; and are therefore much more pardonable than those that go up fiercely by prudence. A wife man will eas-ily remit injuries, faith Seneca, if he understand that they proceed not from a deep rooted hatred, but from some sudden puff of passion. And a little after, Sometimes he sooner remits greater injuries, than he doth lefer; that is, if the former be committed through rashness, and not cruelly; and the latter proceed out of a long lingering and invertebrate malice. Neither will he punish the same thing in two several persons in one and the same manner, if what the one did unavoidably, the other did wilfully. Thus also Philo in his Exposition of some certain Laws, Dimidiation eff facinus ubi non antecessit longa animi deliberatio; That injury abates one half of its punishment that is unpromediated: of which kind are thefet that we are provoked unto by pure necessity, which...
which if it do not altogether justify, 'yet it extenuates the fault. Thus the Samians in Thucydides told Alcidai the Lacedemonian, when he would have put the Captives taken at Oino to death, That it was not probable that he came to see Greece at liberty, as he pretended, who killed men no ways obnoxious unto him; but only were they associated with the Athenians, whereunto also they were compelled by necessity. So also St. Chrysostome, Strangers can forgive Strangers, and one Enemy another, if the wrongs done by them, though never so great, were involuntary, and done by mere compulso. For as Democritus pleads against Aristocrates, So strong and impious an Orator is necessary, that it robs us of our freedom in judging what is and what is not to be done in any thing that lies before us; wherefoever such Cafes are not to be too nicely sifted in a Court of Equity. Concerning which Point, the fame Democritus doth much enlarge himself in his Oration concerning Saff writing, against Stephanus. To the like purpose is that of Thucydides also. It is very probable, faith he, that God himself is ready to forgive whatsoever is involuntarily committed, either in War, or in such other like cases of necessity. For the Actions of the Gods have ever been so many Sacramentaries for such to fly unto as have offended against their wills; for they only are to be persecuted at Malsactors, who are willingly and professedly so; but not they whom extreme necessity hath enforced to transgress. Thus it is by the Hebrew Laws, as we may collect from that place, wherein it is provided, That he that had ravished a Damofel in the Field was to be put to death, but in the Damofel there was found nothing worthy of death; because there was a force upon her. The Caritics in Livy humbly befought the Romans, That they would not call that an act of compulso, which was an act of pure necessity. And Justin, speaking of that execrable act of Sacrilegide committed through the Phociians, faith, That the scandal thereof did more properly belong to the Thebians, by whom they were reduced to that extreme necessity, than to the Phocians. It was the opinion of Isocrates, That he that was enforced to steal or else to starve, had an excellent Advocate to plead his Paedon, meaning necessity. Of the same opinion was Arifhilde in the like Case, Difficuta tempestat eructationem ad quam damnant delectabulitox. The difficulty of the times is some excuse for those that fly away; as the dangers of a chief Siege, a Pannie, or Plague, are the best Picas for Fugitives. Philostratus exculpt the Melfianos for not entertaining those that were banished Athens upon this ground, That they durst not do it for fear of Alexander, whom they and all Greece at that time found in awe. The like doth he in Aristotle, who being compelled through necessity to do some unjust act, confessed himself that he was unworthy, half wicked; but neither altogether unjust, nor at all malicious. Thus Cicero in Thucydides aggretates the crime of the Miltiylvans, The injuries they have done us were not casual nor compulso: but voluntary, may malicious, but those injuries only are pardonable that are done unwillingly. Philo therefore instructs his Prince thus, That whenever he was provoked to revenge or to punish, he should learn how to distinguish between such as were notoriously and professedly wicked, and those who were only overtaxed with a sin, or overborn by some violent tempations; For to kill all that have in the least degree offended, is brutish and savage. Themistius in his Panegyric upon the Emperor Valens, thus applieth these distincions to our purpose, Thou, faith he, half wisely differing, O Emperor, between acts of prepensd malice, acts of humane frailty, and acts of inevitable misforntune. And although thou hast not at all conversed with Plato, nor read Aristotle; yet harby thy practice been much according to their Precepts, whereby thou hast justified their Sayings. Thou hast not inflicted the same punishment upon all sorts of Offenders, upon those who were the first Authors of the War, and upon those who in process of time were arraigned in it, and upon those who have since yielded themselves, as into the Conqueror; but illos dammali, hos calligali, & pottermos miserautos es; The first thou hast condemned, the next thou hast chastisef, and on the last thou hast bad compulso. And the same Author in another place thus instructs a young Emperor, Observe, faith he, what a vast difference there is between an act done through misforntune, an act done through imprudence, and an act done out of obbligate malice: Now accordingly it becomes a Prince to pardon the first, correct the second, but to persue those last, even unto death. Thus did the Emperors Titus, as Tertullian records it, punish the Leaders of the people severely and exemplarily, but for the multitude be only rebuked them with sharp and menacing words. Those thefts that are done by misforntune only, and that could not be avoided, neither due to be punisht, nor are liable to restitution. Those that are willful and malicious do both due berfe punishment, and are liable to restitution. But those of a middle nature that are done through rashness or imprudence, do engage us to restitution; yet are not always punishtable: but if they be, yet not unto death. What Themistius said of the Emperor Valens, Xiphilinus testifies of that most excellent Emperor Trajan, That though he were not capable of much bookish Learning, yet what concerned himself, and matters of Government, he both knew and practisht. The like Testimony Herodian gives of Marcus Aurelius, That he was the only Prince whose wisdom consisted not in Discourses or in speculative knowledge; but in a grave, constant and sober habit both of life and manners. The like Character doth Xiphilinus give of the Emperor Marcus, Leges non tam moratur extre, quam subiter exequatur; He was not so skilful in the Laws, as he was exact and faithful in the execution of them. God grant such Princes unto us in our days.

See Book 2. Chap. 20. Sect. 29, and Soft 3. in this Chap. 5. in this Prof.
Every History will furnish us with Examples of the different punishments inflicted on
the principal Authors of a War, and those who have been seduced into it. Herodotus tells us,
That the Grecians did favourably punish the chief Authors of the Revolt of the Thebans, to
the Medes. So doth Livy, That the chief Citizens of Ardea were beheaded. And when
Agrigentum was taken, he tells us, That Valerius Levinus took the principal Leaders of
the people, whom having first whipped with Rods, he afterwards beheaded; but the rest, together
with the spoil of the City, he sold. And in another place he tells us, That Atella and Calahis
being taken by surrender, the Leaders of the people were put to death. And elsewhere he
thus bequotes the Roman Senate, Seeing that the principal Authors of this Rebellion are de-
feriously punished by the Immortal Gods, and by you, O Fathers Conscript, what doth it please you
shall be done with the innocent people? Whereupon it was at length decreed, That they should
not only be pardoned, but that the City should be referred unto them, that so, as he there
speaks, "Unde orta culpa est, ibi pana conficiet, Where the crime began, the punishment
should cease." Euripides highly commends Eteocles the Argive, for that,

"Culpam ferbo, temor ido judicis
Rom ips ; non Orbis Patria, quis passio mali
Reitoris ergo justissim, columniam.

Whilft he was judge, the guilty perfom fill
Bare his own punishment; nor was't his will
That Princes crimes their Subjects bloud should spill.

And the Athenians, as Thucydides tells us, repented of that Decree which they had past
against the Mitylenians, whereby the whole City, rather than the principal Authors only of their
defection, should be put to the sword. And when Demetrion took Thebes, he put ten of the
Leaders of the people to the sword, and spared the rest; as Diodorus testifies.

But even in the Authors of the War distinguished as most equitable Plea for Par-
don, when to those injuries we have done, we have been provoked, not by any hatred to the
adverse part, nor by our own cruelty, but by the Bonds of love and faithfulness to o-
thers. Seneca's Wise-man will sometimes dismiss his enemies with safety, yea and sometimes com-
mand them too for their fidelity, when he is convinced that their engagement in that War was upon
just and honest grounds; as to express their loyalty towards their Prince, to assist their own liber-
ties, or to keep faith with their Friends and Confederates, wherein they stood obliged. The Ca-
rines in Livy beg pardon of the Romans, for affilling their Kinmen the Phocians and o-
thers, who according to the League which, with the good leave of the Romans, they had
entred into, had helped Antiochus. Arildides, concerning the Thebans, who had under the
Conduct of the Lacedemonians made War upon the Athenians, faith, That they
were engaged in a just action, but not without a plausible excuse, being thereto induced by their
fidelity to the Prince of their League. Cicero also concludes them to be pardonable,
who neither begin the War through hatred, nor prosecute it with cruelty: Besides, that
War which is undertaken merely for Glory and Empire, is not to be prosecuted with too
much severity: which King Potimion seems to intituate to Demetrion, when he tells him,
That he did not make War for Pknder and Spoil, but for Glory and Empire only. So Severus in
Herodian confesseth, That when he first entred into a War with Niger, he had no very pleas-
bable pretence to quarrel with him; but the Empire lying at stake, and the Title as then dubious, each
of them endeavoured to gain it to himself. What Cicero observed in the War between Pom-
y and Caesar, doth very often fall out, That the thing in question was very obscure, the Confit a-
mony Commanders very great; insomuch that many of us know not which Cause is best. But in
his Oration for Metellus he thus pleads, We may perhaps be guilty of some failings, being
as men subject to error; but we are certainly clear from all wickednes. Thus also doth the
same Cicero excuse Deiotaros to Caesar, for that he followed Pompey, not out of any hatred to
Caesar; but being misled by vulgar error. So likewise Sal latin his History, The residue of
the multitudes, led more by popular reports than by their own judgment, do one follow another, e-
every one thinking his Leader wiser than himself. What Brutus sometime said of Civil War,
may also be said of all other Wars, namely, That they should be more distinctly managed, than to
suffer the common Soldiers to satiate their anger with the blood of the Conquered.

Yea though in finctness of justice have they deferred death; yet oft-times it is more
agreeable to the Goodness, Modesty, and Magnanimity of a Conquerour to forgive
than to revenge. Of this mind was King Theuerick in Caffidore, Those Wars have al-
ways succeeded well to me, faith he, which have ended moderately; for he can never want the
victory, that knows how to use it with temperance and clemency. Sal latin affihts the prope-
riety of the Romans and the greatnes of their Empire, to nothing more than to their
promptnes
promptness to do good. And it was the advice of Tacitus, *Quaest. de Cels. Res.* 1. 12. *tanta beneficentia aequorum supplicibus; To fly much love and kindness to poor suppliants, as courage and resolution towards Enemies. Yea and Seneca tells us, That the most generous of Beasts did disdain to rear and prey upon things vile and abject; Elephants and Lyons scorn things that are precarious, and pafi by what they have overcome. The Author to Herennius Lib. 4. hath an excellent saying to this purpose, Our Ancestors, faith he, did very wisely observe this custom, never to put any King to death whom they had taken in War; but why? because, faith he, it would seem unreasonable to use that power which fortune hath now given us, to destroy them whom the fame fortune not long before had so eminently favoured. And why should I now punish them? because they have led their Armies against me? This having now got the victory, I am willing to forget, Quia viri fortissi mi qui de victoria contendant eos fortes putare; qui uelit seum, cos homines judicare, ut pollit Bellum fortitudino minuere, Pacem humanitatis augere: Because it is the part of a valiant Commander, to esteem men as Enemies whilst they are able to contend for victory; but being overcome, then to pity them as men; that so victory may end the War, and humanity confirm the Peace. But you will haply say, what if he had overcome you, should have been done so? wherefore then should you spare him? I answer, Quia talem fluctuatum contemptere, non imitari confuevi; Because it is my custom to confound, and not to imitate such folly. Now if this Author did mean this of the Romans (which is very uncertain, because he intermixes many strange, and indeed Romanitic stories, with some true ones) it manifestly contradicts that which we read in the Panegyric of Constantine the Son of Constantius, He aids the part of a prudent man, who having conquered Enemies can bind them to himself by a free pardon; but, he, of a valiant man, who having vanquished them, can triumph upon them. Thus half revived, O Emperor, that ancient confidence of the Roman Empire, who triumphed in the death of those great Commanders whom they had taken in the War; for in those days their Captive Kings, after they had exceed their triumph, by attending the Conquerors Chariot from the Ports to the most public place of the City, as soon as he turned his Chariot towards the Capitol, were hurried away to Execution. Only Perseus upon the interpolation of Paulus Æmusius, to whom he had yielded himself, escaped the severity of this custom; but the rest having their eyes put out, remained for ever after in Chains: teaching thereby other Kings rather to preserve their faith and friendship with the people of Rome, than to exasperate their justice. But these things are written somewhat too loothly. *Jos. plus in his History concerning the death of Simon Bar-jore, testifies the fame severity of the Romans; but he speaks of such Captains and Commanders only as was Pontius Samnus, but not of such as carried the titles of Kings, whose words found thus, The conclusion of the triumph was after that the triumphant Chariot was come to the Capitol; for there by the Ancient custom the Conqueror was to stay till tidings were brought of the death of that great Commander, whom he led in triumph; who having an hotter caft about him, was presently drawn into the Market-place, his Keepers whipping him forward: for in that place by the custom of the Romans, such as were condemned for Capital crimes, were put to death, and there executed. So soon as it was declared unto the Emperor, that his Enemy was dead, they immediately proceeded to perform all other the Rites that were in those cases provided very joyfully. The very fame ceremonies doth Cicero also recite in his Oration concerning Punishments. Concerning great Commanders thus Executed, Hillocy affords us examples enough, and some few of Kings also, as of Arilonicus, *Jugurth, ArThasphal;* I should be loth to revive this obloque custom, yet we read that Tofh in put to death those Kings that he took Captives. And Dion relates of Saffynis, That he whipt Antigonus with rods after he had fastened him to his Cross. But withal the same Historian wisely adds, Which no King ever suffered by any of the Roman Conquerors. The fame History we may also read in *Jos. plus. Eutropius likewise records it of Maximinvs Herculanus, that having slain the Franks and Almans, and taken their Kings Captives, He expel them to be devoured by wild Beasts. So doth Ammianus concerning a King of the Almans, who being taken Captive was crucified. Yet even among the Romans there were divers Kings besides Perseus, that escaped the severity of that custom, as Syphax, *Genius, Joba,* and in the time of the Cefars, *Carallius,* and others: Whence it may appear that the Romans (though as Cicero and others blame them for being too fevere in this case) had always some respect both to the causes of the War, and also to the manner of its prosecution, when they thus punith'd them: And therefore it was no ill advice that Ammianus Plautus gave to the Roman Senate in the case of Perseus, Si nihil humani metuerint, at divum vindicant iminent us immemorere qui victoria insoluenda manuer; Though they stood not in awe of any humane power, yet they should do well to fear the anger of the Gods, who never failed to avenge themselves on those who abused their favours, with too much pride and insolency. Plutarch in the life of Agis observes, that in the Grecian Wars such vengeance was born unto the office and dignity of a King, that their very Enemies durft not offer violence to the Lacedemonian Kings. An Enemy therefore that considereth not what humane Laws permit to be done, but what in equity he ought

Orat. in Ver.

Jos. Ant. 1. 5.

Dion.

Jos. Ant. 1. 5.
ought to do, or what Religion and Piety requires to be done, forbears the shedding of the blood even of his Enemies; neither will he sentence any man to death, unless it be to preserve life or livelihood to himself, or for such personal crimes as by the Laws of God or Man deserve death; yea, and though some of them do deserve it, yet in consideration of humane frailty, and of the inftability of fortune or some such probable reafons, he either altogether omits, or at least contents himself with such a punishment as is not capital. It is an excellent observation that Diodorus makes, That whoever succeeds properly in War, whether it were the expugnation of Cities or victory in Battel, Sepe fortune magis quam virtuti debetur; are for the most part rather the gift of fortune, than the necessary effect of true valour. But to shew mercy unto fuch as they have conquered, is the work of Providence only. Thus Alexander in Curtius, Though he was highly incenfed againft the Authors of the War, yet he thought it prudent to forgive them all.

Concerning fuch as may occasionally or accidentally, but not intentionally be killed, mine opinion is (as I have already faid) that if not for juflice fake, yet for pity, we ought not to attempt any fuch deſign, wherein the safety of fo many innocents may be concerned, unlefs it be for some very great caufe, or for the neceffary prefervation of a multitude. Of the fame mind was Polybius, It is a good mans duty not to profeft a martial War, though againft fuch as are not juft, any longer than till they have given fatisfaction for the wrong done, and reformed what is amifs, but not to involve the innocent with the nocent in the fame punishment, but rather to spare the nocents for the innocents fake.

These things being granted, it will be no hard matter to determine fuch things that are more special; for (as Seneca in thofe Books, wherein he feems to be angry with himfelf, obferves,) Parum atas excitat, Fanum fces; Children by their none-ages, and Women by their sex are to be excufed. God himfelf in the Wars of the Hebrews, even after the Peace was offered and refufed, took fpecial care for the prefervation of Wo- men and Infants; fome few Nations only being by a particular Law excepted, againft whom the War that was made, was not in the behalf of man but of God; and therefore it was called the War of the Lord. And when he commanded the Midianitifh-Women to be flain for crimes properly their own, he excepts thofe who were pure Virgins, yea, and when he threatened imminet deftruction to the Ninivites for their crying fins, he feared himfelf to be moved, to retraft that fentence by the comphation he took on fo many thousands of Infants, who knew not good from evil. Very like whereunto is that of Seneca, Num quis irae suit puri, quorum atas nondum novit rerum dextra, Will any man be angry with an Infant, whose age is not yet capable of understanding the difference of things. So alfo is that of Lucan,

Crimine quo parvi cadem potuere mereri.

For what crimes may poor Infants flaughtered be.

If God then, who without any caufe at all, may without violation of his juftice, deftroy any of what Sex or Age foever, as being Lord and giver of life; do thus, not only spare Women and Children himfelf, but command us alfo so to do: How doth it befet men, to whom God hath given no fuch Right over the lives of others, but what is neceffary for the confervation of humane safety and fociety, to deftroy in our rage fo many innocent pefons, who can neither refift nor deferve our anger. Let us therefore in the firft place obferve, what the judgment of thofe people and of thofe times was concerning Infants, wherein Religion and Piety were in greateft efteeem. We, faith Camillas in Livy, come not armed againft Women and Children, for though we deftroy their Ciy, yet we spare them; but our Armes we use againft fuch only as are armed. And Plutarch handling the fame Subject, tells us, That good men obferve fome Laws even in War: Where we must note that faith, among good men, that fof we may diftinguifh between this moderaction, and that licence which is supported only by cruelty and impunity. And Livy fparking elsewhere of Children faith, A qua statu etiam bolites irati abstinentem; Whom in regard of their age an Enemy though enraged would spare. And in an other place, describing the more than humane cruelty committed in War, he faith, Utique ad infantem cadem ira crudelis pervenire; Their cruelty was fuch that they spared neither infants nor fuffking. Pliny in his natural Hiftory difcourfing of the Lyon, faith, That when he roamed about he preyed upon Men rather than Women, but never upon Infants unless extremely oppref with hunger. Horace passionately complains of the brutifh cruelty of Achilles, who was fo merifef, that he spared not Infants, no not in the Womb.

Necios fari pueros Achiviom
Urere flagminis etiam latentes
Matris in alvo.
The Trojan Babes but lately born,
And tho' that from the Womb were torn,
In fire be burnt.

Philo also in his Special Laws tells us, That there may be a thousand specious pretences for men to quarrel with men; but for men to quarrel with infants and sucklings, Ne calumina quidam quod dicat, habet; Even malice it self can have no pretence, they are so very innocent. Josephus likewise speaking of Macceneus, faith, That he that in War destroys, leaves nothing undone that cruelty can do. And he records it of Judas the Maccabite, that upon the taking of Bostra and Emprhoreon, He destroyed all the Males amongst them, and whatsoever he found in them able to fight. And in another place, he calls that punishment which Alexander furnamed Thracidas inflicted upon the Jewish Women and Children, A revenge worse than human. Agathias also concerning this Subject writes thus, For as much as pity forbids us to exercice our rage upon infants newly born, who must needs be ignorant of their Fathers crimes, therefore shall this sin be surely and severely visited upon you. Nicetas also, or whosoever else continued that folly unto the times of King Henry, writing of the Scythians, who took Abyra, faith, Neither were their Babes at yet sucking at their Mothers breasts, exempted from their out rage; but were either mowed down by the sword like grass, or suffered to pine and wither like blossomes for want of nourishment. A most barbarous all of men void of humanity, and bearing no sense of the wrong done unto nature herself, nor of the breach they made of the Laws both of God and Man, by extending their cruelty beyond what was necessary in subduing their Enemies. Whereunto we may add those Pious Mandates given by Queen Elizabeth, recorded by Mr. Camden in the Year 1596, who when the Lent out her Fleet against the Spaniard, gave charge that if they took any Towns, they should spare the Female Sex, and those of feeble Age; and offer violence to none but to such as refi'd. Now that compassion which seems to have been in all Ages taken of Infants, and such as have not yet attained to the use of reason, is for the most part shewed unto Women, that is, if they have done nothing in their own persons that may particularly deserve punishment; or if they have not personally performed such service, as properly belongs to Souldiers only. For as Statius notes, It is Sexus rudis infciente ferit; A sex that is ignorant and unfit for War. As the Captain in Seneca's Tragedies demanded of Nere, who had termed Otho an Enemy, Femina hoc nonem capit? Can a Woman be fo call'd? For which Caece Tucca and Varus, thought it fit to expunge those two Verfes in the fcond of Virgils Aeneads, where Aeneas confults about the putting of Helen to Death. It was a magnificent Speech of the great Alexander in Curritis, It is not my custome to make War against Captives and Women, Armatus fit opetor quem oderim; He must be armed whom I look at, as an Enemy. So Gryphus in Jutine denies, that either be or any of his Ancitores, in all their Wars foreign or civil, did ever after the Victory obtained, exercize their cruelty upon Women, whom their very sex did sufficiently guard, as well from the perils of War, as from the rage of the Conqueror. And so doth he in Tacitus proffes of himself, That he never made War against Women, nor against any others, but such as he found armed to refilt him. Valerius Maximus relating the barbarous outrage, which Molumtus L. 9. c. 1. Flaccus exercised on Women and Children, calls it Efferravat crudelitatem, & auditu etiam intolerabilem; A savage cruelty and not with any patience to be heard. The Carthaginians, as Dioctrius tells us, at Salins destroyed not the Women and Infants only, without the Lis. 13. reft fece of humanity; but their very Beasts also, which he elsewhere calls, an off of cruelty. Now what Latinus Pacatus said of Women, that they were, Sexus cui Bella par- cunct; A sex always favoured in War. The like doth Papinian say of old men, that they are,

Nullis violabilis armis

A sort of People that no Arms can hurt.

What we have said of Women and Children, may also be said of all men generally, whose manner of life is altogether abhorrent from deeds of Arms, Ture Bcll in armatus repugnanteque cader; By that Right of War which is most agreeable to the Law of nature, they only are to perils by the sword, who have actually taken up the sword. Where there is no power to refilt, there can be no cause of revenge. So Jofephus, It is but juft and equal that they that take up arms, should be punished by Arms, but the innocent should always be indemnified. Thus Camillus in Livy when he had taken Fegi, commanded his Souldiers to spare every man whom they found unarmed. And among thefe, they are in the first place to be spared, who are converfant about things sacread and holy; for anciently, it
was the general custom of all Nations to exempt such from bearing Arms; and for that cause were they also privileged from the Force of Armes. For seeing they could do no violence, therefore was no violence done unto them. Though the Philistines were mortal Enemies to the Jews, yet did they forbear to use any violence to the College of the Prophets at Gaza. So we read of David, that he fled with Samuel to another place, where there was such another College of Prophets, as to a place of refuge against all hostile violence, 1 Sam. 19. 18. Hecatus, when he beguiled Hierotheum, sent Sacrifices to the Temple; as the Jews tell us. And the Goths are commended by Propocius for sparing the Priests that belonged to the Church of St. Peter and St. Paul, being situate without the Walls of Rome. Plutarch records it of the Cretians, That though they were embroiled in Civil Wars, yet did all Parties carry themselves inoffensively towards their Priests, and towards those that had the charge of burying the Dead. It is observed by Strabo, That when all Greece was harassed with Intolerable Wars, the ±Eleans being confractated to Jupiter, together with those that came to joyn in with them, lived in great peace and security. And Servinius upon the seventh of Virgil's Æneads. Speaking of a Reverend Old Priest, faith, Emm defendebat à Bella, fenon Ætatis, satis Religion Sacerdotes; That he was privileged from all violence, if not by his Age, yet in respect of his Priesthood. In like manner allo they that went up to try their Fortunes at the Olympic, Pythian, Nemean and Ithynnian Games, though in the time of War, were on all fides protected. The like Priviledges and Immunities from the calamities of War were due unto such as, though no Priests yet, do voluntarily fequester themselves from worldly Affairs, giving themselves up wholly to piety and devotion. For whom the Ecclesiastical Canons (grounded upon natural equity) do make the same provision as they do for Priests. To thefe allo we may add those who spend their time in either the invention or perfection of such arts as are useful or necessa-

ry for humane Society. Wherefore Proteogene being demanded by Demetrius, H.s he durft trust himfelf without the Walls of Rhodes? Anfwered, That he knew Demetrius warned against the Rhodians, not against Arts.

Next unto these are Husbandmen, who are also provided for by the Canons. Diodorus Siculus records this in honour of the Indians, That in their Wars they that are Souldiers do kill and destroy one another without mercy; but fuch as were employed in Husbandry they never molested, as being Benefactors in common to all Parties. The like doth Plutarch tell us of the ancient Corhians and Megarenses, Nemo Agro Gale ab officiaber nullo; Not one of them would wrong an Husbandman. Thus favourable was Cyrus in Xenophon, as appears by the M-fage he lent to the King of Assyria, wherein he tells him, That he was very willing that Husbandmen should follow their Callings without any disturbance. And it is a very honourable testimony that Suidas gives of Beliaris, and worthy of all menimitation, That he was so great a friend to Husbandmen, and took such care for their indemnity, that whith he commanded the Army, no Souldier durft ever injure them. The like Teflimony doth Propocius give of him.

Next unto Husbandmen, the Canon provides for Merchants, and not only for fuch as are Factors and Sojourners in the Enemies Country for a while, but for fuch as are perpetual Subjects; because the course of these mens lives are altogether averse from War; where also we must note, That under this general name of Merchant are comprehended all kinds of Trade-men and Artificers, who for their gain do usually prefer Peace before War.

Let us now proceed to fuch as have been Armes: That of Pyrrhus in Seneca we have already quoted, namely, That though the Law permits us to do what we please to Captives; yet equity and confcience forbid us to take away their lives. Of the like opinion was Alexander, who (as we have faid) places Captives in the fame condition with Women: whereunto we may add that of St. Augustine to Boniface, Hauem patientem necessitas pe-rimas, non voluntas; It is not cruelty, but necessity, that makes us defiy a fighting Enemy. As force and violence is properly used against thofe that are armed againft us; so to thofe whom the chance of War hath left naked and unarmed, mercy and compassion is peculiarly due; especially to thofe who can no ways endanger the publick peace. Xenophon writes of Acielus, That he gave command to his Souldiers not to destroy their Prisoners as Malefactors, but rather to preserve them for humanity sake. And Diodorus teflimynies of the Greeks, That they always fought violently, where they found resistance: But to thofe that were subjected they were very merciful. Sal-

lauf in his Jugurthine Hiftory, speaking of some young men, who having yielded themselves, were put to death, faith, That it was done contrary to the Law of Armes; that is, contrary to equity and the custom of civilized Nations. Laflantius of the times he lived in, faith, Par-

citor villis & eli locus inter Arnae eminentis, We spare thofe whom we have conquered, and there is Clemency to be used, even in Armes. Tacitus commended Primus Antonius and Varus, two Flavian Commanders; for that they never committed any act of cruelty, beyond the place

where the Battel was fought. So likewife Arifides, It is the custom of our Age by force of Armes to subdue thofe that refift us, but to deal mercifully with thofe that submit unto us. Con-

cerning fuch as were taken Prisoners in the War, the Prophet Eliaa puts this Quotation to the
the King of Samaria, Wouldst thou kill those whom thou hast taken captive with thy sword and with thy bow? When one in Europaides demanded, Whether the Grecian Laws did forbid the killing of an enemy, he as readily answered, Quem Murs religios Petra superstiti s; but they did, if that Enemy forsook the Fight. And therefore Eurystheus, being taken Prisoner, comforts himself in this,

He that kills me guileless shall never be.

Plutarch comparing Marcellus with Pelopidas, seems to condemn Marcellus for his cruelty in shedding blood unnecessarily after the Victory, whereas neither Pelopidas nor Epaminondas did ever put any to the Sword whom they had overcome, neither did they take away the liberty of any City that they took; neither would the Thebans (as it was believed) have exercised that cruelty upon the Orachomceans, had either of these Commanders been present. Besides, when Sappio would have put all the inhabitants of Otica to the Sword, without regard of Age or Sex; because they had taken part with Cesar, Cato would not suffer him: But protesting against it as an act of inhumanity, and calling the Gods to witness in open Council, with great difficulty he saved them from so great a slaughter. Procopius in the first of his Persian Wars, which he also repeats in his second, Faith, That to offer cruelty to the Conquered, is repugnant to the Rules of Piety, so that when Cabadas King of Persia, after he had taken the City Armada by storm, had made great slaughter among the Inhabitants, a certain old Priest told him, That to kill so many Captives, was not Kingly. And the same Procopius elsewhere records an excellent Speech of Behfairus to his Soldiers, upon the taking of Napes, dissuading them from the unnecessary effusion of blood; Do not (faith he) extend your hatred of your enemies beyond measure: No Conquerors continue to hate the Conquered: If you kill them now, you do not abate the number of your Foes, but of your Subjects. Do not therefore prosecute your revenge too far; but consider, that having subdued them, to become now Slaves to your own passions, is ignoble. When Alexius the Emperor was persuaded by one of his Council to kill his Scythian Captives, he made this noble Answer, Though they be Scythians, yet are they men; though they be enemies, yet do they deserve pity: It is the chance of War only that puts the difference between us and them. It is a most excellent Observation that we read in Gregorys, Whate'er is done in the heat of Fight is pardonable, because the faculties of Difcourfe and Ratiocination is (as it were) block'd up, so that the hands, being as it were drunk with anger and revenge, and wanting the guidance and manumission of Reason, do even they know not what. But when by our strength and courage our dangers are over, and our Reason enjoy her liberty to examine and judge of what we are about, and to influe our Mandates to the hands for execution; then if a ny thing be done unjustly or merrily it plainly shows the pervertence of the mind. Julian in his second Panegyric on Constantius, under whose Perfon he describes a vertuous Prince, Faith, That having conquered his enemy by force of Arms, he makes no further use of the Sword, objecting it impious to kill him who is no longer able to defend himself. And therefore Diodorus Siculus condemns the Byzantines and Chaledonians of notorious cruelty, for killing a multitude of Captives taken in War. And in another place he tells us, That it was a Law generally observed to spare Captives, and that he that violates this Law doth, doubtless, fix against God and man. And hence it is, that in all Stories we find those Commanders highly commended, who having taken a multitude of Captives, whom they could not without danger and that they keep, had chosen rather freely to diminish them, than to kill them. Wherefore they that in a Battle shall cry for Quarter, or in a Siege shall offer to yield upon Conditions to save their lives, are neither of them to be rejected. The Romans (as Procopius tells us) this befriends the Persians whom they held closely besieged in the Port of Petra. We, say they, do extremely commiserate your hard condition, and would gladly spare you; though ye wilt to dye: and that life which ye so nicely disdain, we would save, as it becomes Christians and Citizens of the Roman Empire. And therefore Arrastus speaking in that Slaughter, which the Thebans made of their Captives that they yielded the mercy, faith, That it was not according to the custom of the Grecians. The like we read of Thucydides, That did accept of it, who willingly and with lifted up bands begged to be received to mercy, and it is not the custom of the Grecians to kill such. The Syracusan Senators in Diodorus tell us, That to spare a Suppliant is the sign of a truly noble and magnanimous spirit. And Sopater confesseth, That it was the custom of the Grecians to fave such as begged for life in the Wars. In Towns that were besieged this custom was generally observed by the Romans. That if they yielded before the Battering Ram touched the Walls, the lives of the Citizens were saved. Cesar signifies to the Adiutives, That he was willing to preserve their City, in case they would surrender before his Ramms approached their Walls; Which custom is yet observed, with this difference, In places meanly fortified before the Cannons begin to battery; but in places of great strengt, before a breach be made in their Works. Howbeit, Cicero respecting not too much what may lawfully be done, as what in equity ought to be done, gives his opinion in this Case thus, Seeing that we ought to provide for

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2 Kings 6. 22.
the safety of those whom we conquer, it is fit that we receive them into protection, who shall surrender themselves, though our Ramus have battered their Walls. The Jewish Interpreters note, That it was a custom among their Ancestors, when they had laid close Siege against any Town, not to incircle it with a Ditch quite round, but to leave one part thereof open for such to fly, as would have themselves by flight; whereby the Town might be taken with the least effusion of blood. Thus Scipio Africanus being commanded to destroy Carthage, made Proclamation, That they that would provide for their own safety by flight, might do it freely; as Polybius testifies.

The same equality bids us to spare those who are willing to surrender themselves to the will of the Conquerour, without any Conditions at all. Trucidare deditis causam, To kill those who are at our mercy is cruelty, saith Tacitus. So also Sallust, rehearting that bloody fact of Marus in putting to death those young men among the Campians that had delivered themselves to mercy, saith, That it was facinus contra jus Belli, A cruelty scarce justifiable by the natural Right of War. And in another place he complains of the like cruelty,aying, That he was so far transported with rage, that he put to the Sword not only men armed, and such as were in Battel, which he might do by the Law of Armes, but even Culpaeus also that begged for mercy. So also Livy, Qui deditis causa jus, ac fas Bellum intulisset; He made War even against those that yielded themselves, contrary to the Laws of God and good men, Nay, the principal design of a General should be rather to force his enemy through fear to surrender, than to kill them. And herein is Brutus to be commended, who would seldom fall on his enemy by assult, but chose rather to encompass them with his Horse, commanding his Soldiers to spare them, who ever long would be his own.

Against these Rules of Right and Equity, are usually brought these specious Exceptions, which notwithstanding have little of solidity in them: as namely, What if such acts of cruelty be done by way of retaliation? what if they be done by way of example, to deter others? or what if it be done against such as have been notoriously obdurate? None of these are sufficient to justify an unnecessary or unjust Slaughter, as is easily to be collected by what we have already written concerning the just caufes of killing Enemies. For from Captives and such as actually deliver themselves or desire to do, there can be no danger. That therefore they may justly be put to death, there ought to precede some such crime, as to an impartial Judge should deserve death. And thus we may happily read of cruelty sometimes used unto such as have either been taken Prisoners, or yielded without Conditions of life, if being convicted of the injustice of the War, they have still persifted in Armes, or if they have reproached or defamed the Conquerour with bitter invectives, or have broken their faith, or somewhat of the Law of Nations, as the privileges of Ambassadors, or have been Traitors, Renegadoes, or the like. But as to the Objection of retaliation, Nature doth not admit thereof, unleas it be against those numerical persons, who have done the wrong. Neither will it suffice to say, That the Enemies do all of them make but one Body by their combination against us, as may easily be gathered by what hath been already faid, when we treated concerning the communication of punishments. For, as we read in Arisftides, Is it not a shame to imitate that as just, which we condemn in others as unjust. Upon which account it was that Plutarch blames the Syracusians for putting to death the Wives of Hicetas, and his Children; for no other caufe, but because Hicetas had before put Dion's Wife, his Sifer and little Son to Death. But as to the profit which may hereafter be expected by putting a terror into others, this gives no positive Right to put any man to death that yields himself Prisoner. But if there be just caufe of death before given, this may be one caufe among others why the punishment due may not be remitted. Again, an obfinate endeavour to maintain our own Party, if our caufe be not altogether unjust or dishonest, doth not at all deserve punishment, as the Neapolitans argue in Procopius; or if it do, surely that punishment cannot amount to death, if equity may be the Judge. When Alexander had commanded all the Youth in a certain Town to be put to death, because they defended it so resolutely against him, the Indians told him, That he made War like a Thief or a Murderer; Laternon more bellare Indis iniquis ei, saith the Author; whereupon to preserve his own honour he ever after used his Victories with more clemency. Much more for his honour it was, that he would have spared some Milefians, because he perceived them to be very generous and faithful to their own Party; as Arrianus records. When Ptolemy the Prae
tor of Rhedia was dragged out to tortures and death, because he had resolutely defended his City against Dionysius, as they dragged him along he cried out, That the Tyrant had thus punished him, for no other reason than because he would not betray the City to him. For which cause the Gods would certainly revenge his death upon the Tyrant within a short time. Such punishments as these Diodorus calls unjust. For mine own part, I am highly pleased with that wish of Lucan's.

---Vinct
Moderation in killing Men in a Just War.

So that we understand the word *Citi*, not for Neighbours inhabiting the same Town or Country, but Citizens of the same Universi. Much less can the griefs we conceive for the like loss we have sustained in War, make the unnecessary shedding of blood to be just and lawful, as we may read of *Achilles, Aeneas*, and *Alexander*, who were wont to celebrate the Funeral of their friends whom they had lost in the War (thinking thereby to make an atonement for them) with the blood of their Prisoners, and such as had yielded themselves to the mercy of the Conqueror; which *Homer* devertedly condemns as an unjust act; and which after Ages adjudged as cruelty, as *Seneca* notes upon *Virgil*.

Yes, and where their crimes are such as to deserve death, yet is it the property of mercy to abate somewhat of the extremity of our Right, by reason of the multitude of Offenders; an example whereof we have even in God himself, who commanded the *Hebrews* to tender *Peace* to the *Cananities*, and other bordering Nations, though exceedingly wicked, that so paying an *Annual Tribute* to the Conqueror they might enjoy *Peace*. Pertinent to this purpose is that of *Seneca*, When some particular Soldiers in an *Army mutiny*, the severity of a General is necessary; but if the whole Army threaten a revolt, then is a General *Pardon* seasonsable. And again, *Quid tollis iem fapiens? Turba peccantium*: What is it that *Sower* appeareth the wrath of a *Wife-man*, than the multitude of *Offenders*? *Quo* quid multis peccator inutilum est, When the people generally offend, there revenge is not so proper as pardon.

For as *Livius* in *Xiphilinus* observes out of *Dion*, *He* that will punish all *Offenders* according to the utmost vigour of the Law, will be enforced to destroy the greatest part of Mankind. That of St. *Augustine* is very seasonable advice in this Case, *He* that would reform the errors of a multitude, must do it magis monendo quam minando, more by persuasion than by threatenings. For severity is only seasonable when the number of Delinquents are but few. But when they are numerous, then that of *Lucan* holds true:

*Tat funt infesta juvenes occumere Latho,*
*Sapè Fames, Pelagiique furar, subitique ruina,*
*Auat Terreque Lucet, aut Bellica clades,*
*Nunquam pana fuit.*

Sadly at once so many Youths to fly,
Sometimes a Famine, or a Sea-breath may,
A sudden Fall of Buildings, or a Plague
From Heaven and Earth, or Wars unbridled rage;
(But in cold blood to shew such ire and teen)
By way of punishment was never seen.

And therefore to avoid the effusion of much blood was the invention of *Latas*, or capturing of *Dices* (as *Cicero* testifies) whereas *Salut* gives this reason, where speaking of such bloody and inhumane punishments, he faith, *Quibus uafatur Civitas magis quam corrigitur*, Whereby a *City* is rather wafted and depopulated, than reformed.

By what hath been already said, it may easily be gathered what the Law of Nature doth determine concerning *Hoftages*. In Ancient times when it was generally believed, that every man had as much right over his own life, as he had in any other thing wherein he claimed a propriety; and that this right, was either by explicit or implicit confent transferred into that *Commonwealth* or *City* wherein he lived, it was not to be wondered at; if, as we may read, those hoftages, though in themselves innocent, were sometimes put to death for the offences of those Cities whereunto they belonged, whether they were delivered by their own peculiar confent, or by the publick, wherein theirs also was included: But since a purer light hath discovered unto us, that the foreign power over mens lives is reserved in God alone; it follows, that no man can by his own confent only, give unto another this power, either over his own life, or over the life of his fellow Citizen. Wherefore that noble Captain *Narces* (as *Agathias* relates) did abominate it as an act of cruelty, to put to death such hoftages, as were no ways

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Vincat qui numque necesse
Non putat in ullos fevum disfingere ferrum,
Quique suas Civitatem, quod sejus adversa tolerat,
Non credit sejus nefiis.

His be the Day, who can contented be
To conquer, but not kill his Enemy;
That can believe his Neighbour honest, though
He march against him as an Armed Foe,
ways guilty of those crimes that were committed against him. So also have others done in like cases, even by the example of Scipio (perhaps) who was wont to say, That he scorned to take revenge on the innocent hostages, but he would severely punish the Delinquents themselves, Nec ab inermi fed ab armato holte penas expeniturum; Disdaining (it seems) that revenge that was taken upon an unarmed foe. The very famous law do we read of, given upon the like occasion by the Emperor Julian, as Eunapius testifies. That which our modern Lawyers, and those no mean ones hold forth, namely, That such conventions and agreements are valid, in case they are confirmed by ordinary and general practice; I also condend unto, in case they will understand by right, that which is not punishable; for so, in this argument it is usually taken; but in case they imagine, that they that shall take away the life of any, by virtue of such a pact or agreement only, do not sin, I fear that they are both deceived themselves, and by their perilous examples deceive others. But plainly, if he that comes as a hostage be at that time, or at any time before hath been a notorious offender, or hath afterwards in any matters of moment satisfied his faith given in any of these cases, his punishment may be without injury. But the flight of Clelia over Tiber, when she made her escape to King Ethnues, was not only safe, but to use Livy's own words, an honorable attempt; because she came as a hostage, not by any voluntary act or consent of her own, but by the command of the City she was sent from.

This one thing is yet to be added, that all Duels and Tryals by Combitants, seeing that they are of no use, either to the decision of right, or the ending of a War, but merely for ostentation of strength, are not only repugnant to our Christian profession, but to the Laws of humane society. And therefore all Commanders in all Armies should carefully provide against such unprofitable effusion of Blood, as being liable to render an account thereof to those whole Vicegerents they are; because, as Salut obser\v\es, it is the honour of a General, Incremento exercitu victoriam deportare; To conquer with the least effusion of blood that may be. Tacitus writing of the Catti, a Nation at that time eminent for their Valour and good Conduct, faith, Rari exercitus, & fortunae pugna; They made but very few excursions, and fought as few Battles but upon advantage. Upon which account it was that Plutarch deffervedly cenured Demetrius, Who rashly expos'd his Army to unnecessary dangers, rather out of vain ostentation, than hopes of gain.

CHAP.
C H A P. XII.

Moderation in the spoiling of an Enemies Country.

I. What wast is just, and how far forth it is so.

II. Things profitable unto us, and out of the Enemies power not to be wasted.

III. Nor in case there be great hopes of a speedy victory.

IV. Nor if the Enemy may sustain themselves without them from other parts.

V. If the things to be destroyed are of no use to the maintenance of the War.

VI. As those things that are sacred or thereunto belonging.

VII. So likewise those that are Religious.

VIII. The benefit that attends such a moderation observed.

That one man may destroy the things of another without injustice, it is necessary that one of those three things should proceed: Either such a necessity as may be presumed to have been excepted in the institution of primary Right or Dominion, as when a man merely to avoid some imminent danger to himself, shall call the Sword of a madman into a River; yet even in such a case, there remains an obligation to make restitution to the full value, according to the opinion of the best Authors, as we have elsewhere declared: Or secondly, there proceeds some debt, which arose from some inequality; and then that which is wasted is so understood, as if it had been taken in satisfaction of that debt, for otherwise it would not be just: Or thirdly, there must proceed some crime or wrong done that may deserve such a punishment; or which, such a punishment doth not in proportion exceed. For as it is well observed by a Judicious Divine, It cannot stand with equity or right reason, that a whole Kingdom should be wasted, because some herbs of Cæsl have been driven away, or some houses or villages burnt: which also is acknowledged by Polybius, who would not have punishments by War multiplied without end or measure; but rather that all injuries should be expiated by punishments proportionable. And for these causes, and within these bounds and limits, an Enemies Country may be spoiled and wasted without injustice; but otherwise, unless it be for some great advantage to do another man hurt, and to gain thereby nothing, is but mere folly. Therefore wise men are usually fwayed by matters of profit, whereof the principal is that noted by Onesander, Where he advieth a Prince to destroy, burn, and lay waste his Enemies Country, because, faith he, a scarcity of money and victuals will soon shorten the War, as plenty will prolong it. Confinator whereunto is that of Proclus, It is the duty of a good General to cut off forage from his Enemy, and profound from every side. So thought Curtius of Darius, That having nothing to feed his forces and his Army with, but what he must get by rapine and spoil, he must needs at length be overcome by want and famine. Now, that spoil and devastation may easily be defended withal, which sooneest enforce an Enemy to sue for Peace. Philo the Jew in his Book of a contemplative life, faith, That they are in Arms do in reality destroy and lay waste their Enemies Country, Ut holles so facilius dedit recrum necessariarum penuria; That so being punished by famine, they may without the hazard of a Battle be compelled to yield themselves to the Conqueror. After this manner did the Halyattes make War upon the Milelans, the Thracians against the Byzantines, the Romans against the Campanes, Capenates, Spaniards, Legurians, Nervians, and others. But if we would diligently observe how our modern Wars are managed, we shall find that such devastations are now a days made more out of hatred, than any prudent council: for it so falls out oftentimes, that either those reasons which would persuade us the contrary do cease; or those that dissuade us from it, are more forcible.

And this in the first place happens, when that part of the Country which yields profit is fo in our possession, that the Enemy can reap no benefit by it. And hereunto doth the Divine Law properly look, when it permits wild and unfruitful trees to be cut down to make engines for War, but commands such as are fruitful to be preserved for food; adding this reason, because trees cannot rise up in Arms against us as men may: which precept, Philo by a parity of reason enlargeth to fields and other lands that are fruitful, affiling these words thereunto, Quid rebus animinis qua & miscis fructus, & miscis frutibus ferunt, trauferis? Why art thou angry with things immanitae, especially with such as are in themselves gentle, and that yield fruit and delectable fruit unto others? Do they like men express any menacing signs of hostility against thee, for which they deserve to be eradicated? Are they not much more profitable to the Conqueror whilst they live and bear fruit, than when they shall be torn up? Do they not yield thee plenty of things, not only for necessity, but for delight and pleasure? For trees and fields as well as men, do in their respective reasons pay tribute to thee.

I. What spoil is just and how far forth.

Lib. 2. c. 2. § 9.

VI. de Jure Belli n. 52. 8. 55.

Stat. 5. 6.

Herod. Lib. 1.

Pol. Lib. 4.

Front. Strat. 3.

II. No waisting of things profitable to us, and without the reach of the Enemy.

* Dent. 20. 19.

De Creation. Magist.
Moderation in the wafing an Enemies Country.  

BOOK III.

The Conqueror, yea and much better, being so necessary, that we can no way live without them. And in another place, he commends the equity of Moses, in retreating the licence of Souldiers, from destroying Trees bearing Fruit or Corn before it be ripe, adjudging it very unjust, *I. tom in homines conceptam ergastri in ea qua causa mali nullius fins;* That our indignation against men should be exercised upon things that do no ways hurt us; besides, seeing that all sublunary things are mutable, and that nothing long continues in the same state wherein now it is, some provision ought in prudence to be made for the future. Possible it is, that they that are now most bitterly enraged against us, may upon debate and conference had, become our Friends and Allies. And then we will safely confess, That Amics necellariis fraudure, durum est; To defraud our Friends of necessaries, is very hard. *It is very true what from our Ancelors we have received, We ought so to truft our friends, as if at some times or other they may be our Enemies; that is, that every man ought to retain something within his own breast of what neereft concerns himself, whereby to provide for his own safety, and not so wholly to discover himself by his words or actions, as that he may one day repent himself by reason of the vehemency of other passion, and blame his own rashneffe when it is too late to help it.* This in all Cities is observed as an Oracle. *That in times of Peace they ever provide for War, and in times of War they lay the foundations of a firm and lasting Peace,* we should neither place too much confidence in our friends, because they may prove our enemies, nor should we appear too diffident of our enemies, because they may hereafter prove our friends. But if the hopes of our enemies conversion cannot prevail with us to do them civil offices, yet let us remember, That there is no hostility at all against us in those things which an enemies Country produceth. For all things there are serviceable, all things profitable, all things pleasurable, or very necessary to our selves. All its fruits appertaining unto us, either nourishment, or somewhat that is equivalent unto it. Again, Non oppresset Bellum inferre Belli necessis; We ought not to make War upon those things that are so amicable, so innocent, that they know not what War means. To burn, cut down, and utterly to extirpate these things, which Nature by heat from above and moist from beneath, hath so tenderly brought up and nourished, to so other end but to pay their yearly Tribute unto men, as unto Kings, favours of so much inhumanity. Thus far Philo; wherewith agrees that of Josephus, If Trees, faith he, could speak, they would certainly upbraid us with injuries, for inflicting upon them the plagues and miseries of War, who are in no wise guilty of the confusion of Wars. Neither hath that Saying of Pythagoras any other ground than that, where he tells us, That to cut down or to hurt tender Plants or Trees that bear Fruit, is a sin against Nature, and not justifiable before God. Porphyry likewise describing the manners of the Jews, taking (as I suppose) their Customs to be the bet Interpreters of their Laws, extends this custom or Law to all Beasts that are serviceable for Tillage. Their Talmuds and their Interpreters do yet fretch out this Law somewhat farther, even to all things that may callously perish, as the firing of Houses, the poysoning of Springs, or the spoiling of anything that may afford nourishment to Mankind, unless it be such Trees or Houses, as being near unto the Walls may thereby hinder the Souldiers in the performance of their Military Duties. Agreeable with this Law was that prudent moderation of the Athenian General, Timothem, who would not suffer his Souldiers to destroy any House or Village, nor cut down any Plant that bare Fruit. There is the like Law extant in Plato, prohibiting the laying of any Lands waste, or the demolishing of any Houses. And if we may not waste the Country of an Enemy, much less when by Conquest we have made it our own, Cicero did not approve of the demolishing of Corinth, though the Citizens had unhandly treated the Roman Ambassadors. And in another place he calls that War an ugly, horrid and mediasc War, that was made against Houses, Walls, Pillars, and Posts. Levy highly commends the lenity of the Romans, for that having taken Capua, they did not pull down the Walls, nor set fire on the innocent Houses. There is a most excellent Epistle upon this Argument extant in Proposichius, which Belsbaris writes to Tattias, It hath been, faith he, reputed in former Ages the Glory of wise men to raise fair and magnificent Structures, to preserve their Names and Memory; but to raise and demolish them being built was ever esteemed the badge of folly and madness, as not blushing to transfinit to Poffertory the Monuments of their own wifeneffe. It is confessed by all men, That Rome is the most magnificent and beautiful City of all that the Sun beholdeth: Neither did it arise to this height of splendor by the bounty or indefinity of any one man, or in few years; but many Kings and Emperours, and a vifious vices or succession of Noble-men, many Ages, and a spawnious Maie of Treafurers, have drawn bithe, as other things, to the most expert Artificers in the World, whereby having by little and little brought this City to that perfection, wherein we now see it, they have bequeathed it to future Ages, as an everlasting Monument of their Virtue and Magnanimity; wherefore to raise this City, were to be injurious to Mankind in all Ages; to our Ancelors, in sacrilegiously burning it in their Ruines the memory of their noble Acts; to our Poffertory, enviously depriving them of the very sight of those noble Structures, whereby they may be excited to the imitation of their Virtues. And if it be thus, then consider that one of these two must necessarily fall out, either the Emperour must vanquish, or you: If you be Conquerour, then in destroying this City you destroy not what is your Enemies, but your own; and in preserving it, you enjoy the richest and most beautiful place on
Chap. xii. Moderation in the wasting an Enemies Country.

on the Earth. But in case thou be worth'd, thy clemency in preserving this great City shall plead strongly to the Emperor for mercy, but in destroying it, all hopes of favour ye buried in the ruins of it: and thou shalt not only lose whatever thou canst gain by the Spoil, but an eternal brand of shame and infamy shall cleave unto thy Name throughout all Ages, according to thy dealings herein. For fame is equally ready to report either good or evil of us. Potentum quales sunt aetiones, talis extrematio; According to the lives and actions of Grandees, so is their fame to the Worlds end. Thus far Procopius. It is true, that God himself in the sacred Scriptures did not only command, that some Cities should be destroyed by fire, but also that the Trees of the Moabites, contrary to this General Rule, should be cut down. But this was not done out of an hostile malice, but out of a pure detestation of their sins, which were either publickly known to deserve such a punishment, or at least were so reputed in Gods account.

Secondly, We should forbear to waste an Enemies Country, where the possession of it is in question, especially if there be any probable hopes of a speedy Victory, whereby both the Land and the profits thereof are likely to become the reward of the Conqueror. So Alexander the Great (as Jutine tells us) prohibited his Souldiers from depopulating Asia, telling them, That they ought rather carefully to preserve their own, and not to destroy that which they came to possess. Thus Gelmer with his Vandals besieging the City Carthage, made no spoil, nor took any pillage; but secured the Country to himself as his own. The like Speech I find in Heliodorus, Nonne Terra quam devastamus vostra effe? Is not the Land that we waste, ours? and the people whom we destroy, our Subjects? Wherefore then are we become Enemies to our selves? wherefore do we drive away those who should serve us with food, and pay us Contributions? So Quintinius, when Philip over-run Thessaly, waiting all before him, perfwaded his Souldiers so to march, as if the whole Country were now their own. Thus likewise Cafar pus perfwades Cyrus, not to give Lydia to be spoiled by his Souldiers, by this very Argument, Non Orben mean, non rei mean diripis; while enim ad me fta pertinem: Tus foit: Tus eti perdent. No joker man will voluntarily destroy his own. This Country, these Cities, these Goods, are no longer mine, but thine; the fortune of the War hath left me nothing: All are thine by the Right of Conquest: Whatever then the Souldiers that waste and consume, is not mine, but thine. And to those who after the Conquest shal fo waste and spoil what they have conquered, may that of Jocasta to Polyneices be not unfily applied,

Quo corripi leges, quae meti Gladio jubet, Aliena credis.

Petendo Patriam perdis: ut sit tua
Vis efi numquam: quin tua Caesa nocet
Ipham her, quod Armis vertis infessis solum,
Secterisque adultas permis, et totas fugam
Edis per Agrias. Nemo sic vasbat sua;
Qua corripi leges, qua meti Gladio jubet,
Aliena credis.

Whiles thou seckest to regain thy Country, thou destroyest it; by endeavouring to make it thine, thou makest it none. It is a good Argument against thy Title, that thou labourest to destroy it. No man dar's fo to his own; that which we willfully consume by Fire and Sword, we confess to be not ours, but our enemies. To the same fenie are those words of Curtius, Quaeque ceteris usu perfient, hostiam esse confess, Whatever they had wasted they confess to have been their Enemies. Nor very dierequant are those Arguments which Cicero in his Epistle to Atticus upon the fifth against that Council that Pompey gave, namely, To destroy his own Country by Famine.

Thirdly, We ought to forbear the wasting of an Enemies Country, if we see that they may be otherwise supplied with necessaries, either by Sea or Land. Archilabdas in Tucideis, in that Oration wherein he diffwades the Lacedemonians from making War against Athens, enquires what hopes they had to subdue the Athenians; If by wasting and destroying their Country, they might do well to remember, That the Athenians had other Lands and Countries under their Dominion, which confined not on their Cities (as Thrace and Illyria) and that they wanted neither Ships nor Ports, whereby they might be supplied with necessaries from any other Coasts. In which Case it was best to cherish and protect the Husbandman, even to the Enemies Quarters; that upon payment of their Contributions to either Party, they might enjoy Peace in the midst of War: which we have been done, not only in our own late Civil Wars in England, but (not long since) in the Wars of the Netherlands; which also is very agreeable to the practice of the Indians, among whom, as Diodorus writes, Their Husbandmen enjoy the very same Priviledges and Immunities, as do their Priests; insomuch that they follow the Plough without danger, even in the midst of their Troops, and to the very Skirts of their Camp. And a little after he adds, There is no enemy that will willingly wrong Husbandmen, but will rather preserve them from all injuries, as being the common Benefactors to both Parties. Wherefore it was agreed and concluded in the War

between

If there be great hopes of Victory.

III.

If the Enemy may be else where suppiied.
between Cyrus and the Alcian, as Xenophon records it. That, Cum agricolis pax esset, cum armatis bellum; Thoebh the founders might fight, yet the Husbandmen should live in peace. Neither do the Indians, as Diodorus tells us, either burn their Enemies Corn, or cut down their Trees. Polybius reports the same of Timoleon, namely, that he set the fruit least part of the Country to Farmers and Husbandmen; yea, and as Aristeides, add, sold the Corn even to his Enemies, and with that money paid his Souldiers. So did Viriatus in Spain, as we read in Appian. And Tattius, Writ be besieged Rome, gave no disturbance to the Husbandmen throughout all Italy, but commandd them to follow their busines without fear, so as they sent their annual contributions unto him. This is the Glory of a Conqueror to defend what he hath won, and not to destroy it. And this we have seen in our days to be practised by the Hollanders, who ordinarily sold their Corn and other provisions even to their Enemies, and with the money so raised paid their own Army, with as much equity as profit, even to the admiration of foreign Nations. These manners and customs do our Canons commend to our Christian imitation; because as we profess to be more civilized, so ought we to express more humanity in our Wars, than was practised among the Heathens; whereof they enjoyn us not to spare not the husbandmen only, but the Oxen and Horfes wherewith they plow, and the feed which they carry out to fow their ground. For the felf fame reason doth the Civil Law forbid to take in pawn any of thofe infruments that belong to the plough. The Cyprians and Phrygians of old, and fince them, the Athenians and Romans did condem a it as an heinous Act, to kill an Ox that plowed up the Earth, because the Ox was Mans companion and fellow laborer in tilling of the Ground; it was therefore forbidden by the Laws of Athens, that the Oxe should be offered in Sacrifice. And Suetonius in the life of Domitian tells us, That in the beginning of his Raign, he so far abhorred murther, that in his Fathers abence, remembering that Verfes in Virgil,

An impious people whi on pain bullock's feaft.

He forbaid by an Edict the killing of Oxen. And Aratus in his Phenaomena allures us, that it was not lawful to eat of an Ox that plowed the ground, until the Brazen Age of the World began, nor that their Gods in their bloody Sacrifices should be worshipt by them.

Fourthly, there are fome things of fo innocent a Nature, that they neither caufe a War, nor prolong it; which things, though the War continue, yet common reaion should perfwade us to spare. Thus do the Rhodians plead with Demetrius, who in mere envy had besieged their City, and threatened to burn it for that exquisite piece of Art, the Picture of Japhet drawn by Protagoras, as it is recited by Antiq. Celius, whole words found to this fentence, What reafon (fay they) canst thou give for destroying fo famous a Pi ture, by firing the houfe wherein it is? If thou canft conquer us, the whole City, together with that Pinture safe and uninjured, will by thine own; but if thou fail in that defign, consider what a difhonour it will be to thee, when it fhall be faid, that although thou couldef not conquer the Rhodians, yet thou hadft made War againft Protagoras a dead Painter. Polybius thought it an Act of the highest madnefs to f.Seek to deftoy thofe things, which being deftoyed weakened not the Enemy, nor brought any advantage to thofe that def troyed them; fuch as are Churches, Statues, Schools, and Religious Houfes. Cicero highly extols Marcellus for the care he took to preferv e all the fair Buildings in Syria and, both publick and private, Qua f ad ea defendenda cum exercitu non expugnanda venient; As if he had been fent with his Army to defend the City and not to take it. And a little after he gives this reafon, Our Admiral did ever leave unto the Conquerors fuch things as to them were pleafant, but to the Conquerours of no great use or benefit.

And although this alfo may be pleaded in the behalf of other publick ornaments, yet a more special reafon may be added; for thofe things that are dedicated to sacred ufeS, although thefe alfo are in fome fort publick, and fo not exempted from the outrages of War; yet if there be no great danger that may juftly be feared by them, the very reverence that we owe to thofe holy places, and to the things thereunto appertaining, should plead strongly for their prefervation, especially with thofe that agree in the wor fhip of one and the fame God, though they do differ in opinion concerning fome outward rites and ceremonies. It was obferved as a Law among the Grecians in the time of Themistocles, that when they invaded one another as Enemies, they fhoild always forbear to ufe violence to holy places. And Livy tells us, that when the Romans had fackt and deftoyed Alba, they spared the Temples of their Gods. And when Capua was taken, the Poet Silvius writes thus of the Romans:
Livy tells us, that it was objected against Qu. Enuclins the Cenfor, That by the spoil and ruine of Churches, he had made the people of Rome guilty of Sacrifice; as if the immortal Gods were not in every place the same, but that the Gods of one place delighted in the spoil of the Gods of another. But Marcus Philippus coming to encume about Diuun, under the Temple, gave special command that no violence should be offered to that Holy place. Strabo relates it of one Tellothages. That having (with some others) robbed the Temple at Delphos of some treasure, thought he had sufficiently appeased the Gods by consecrating that Money, with some addition, to the Gods at home (supposing it to be no fa- cile, to depole the Temple at Delphos to adorn his own Temple, both haply being consecrated to one and the same God.) But let us descant to such as were Christians.

Agathias tells us, That the Frankly spared the Temples in Greece, as being of the fame Religion with them: Nay it was usual not only amongst the Heathens (whereof Historians give us many examples, and do therefore call it the common custom of the Grecians) but amongst Christians also, to spare the perus of such as fly for sanctuary to the Temples, even for the reverence they bear unto the places; which St. Auguflin Di Civit Dei l. 1. c. 6. highly commends in the Goths, having taken Rome: who (as he there tells us) had so great a regard to the Temples dedicated to the memory of the Apostles and Holy Martyrs, that in that miserable devastation all that fled thither found protection, whether natives or strangers: Hitherto (faith he) might the fury of the Enemy rage without restraint: But here as by a divine power, it was suddenly checkt: Hither do the commerating Souldiers bring their desirous Captives, left they should be destroyed by their fellow Souldiers that had no remorse: And they, who elsewhere were inexorably bountly, no sooner approached to these places, where the licence which the right of War gave them was interdicted, but insantly all manner of Cruelty and all desirs of revenge wholly vanished. We give such reverence to holy places, faith Apian, That we use no manner of hostility against them amongst our Enemies, though Foreigners.

For as Polybius observes, It is the greatest folly and madness in the world to behave our forces imployingly towards God, because we are enraged against our Enemies who are but men: For much better it is, that God should in those places, after any manner be worshipped, than that they should be made ripping-hofer. It is written of Apollonius, That not in Greece only, but amongst the Barbarians, he spared with holy reverence whatsoever was consecrated unto the Gods; as well their Altars and Images, as their Churches. Mirarique fe prædicabat cos non sacrilegorum numero haberi, qui supplicibus eorum nocuenter; Admiring how they could be excused from Sacrilege that had violated the privileges of those places, by oppressing them who fled thither for protection. The very same testimony doth Plinarch give of him. The like he doth alio of diverse Roman Generals, who in their Conquests, as well in Greece as in Macedonla, did not only spare the Temples of their Gods, but honoured them with pretents, and enlarged both their immunities and privileges. Procopius records it of one Cnabo a Moor, who (though no Christian) yet commanded, That all honour and reverence should be given to Christian Temples: The neglect whereof by the Vandals themselves, he hoped that the God of the Christians (who ever he was) would severely revenge on them. And in the Second Book of his Persian Wars he testifieth the fame of Caffor the Persian King, who, though no Christian, yet took special care to preserve the Christians Church at Antich. Neither durft the Emperor Justinian keep the spoils of the Temple at Jeru- selem, which Vespasian brought to Rome; but they being found at Rome, were transported by Giscarre into Africa; as the fame Procopius testifieth in the Second Book of his Vandal Wars. Nor can I here omit that memorable fact of King Alarick, who having ignorantly received some vessels, which his Souldiers had taken out of a Temple dedicated to St. Peter, and being afterwards informed thereof, commanded the same vessels to be restored by the same persons, adding others of a very great value unto them, to expiate the crime.

What hath been already faid of things Sacred, may likewise be faid of things that are Religious; even of such as are erected as Monuments for the Dead. For though the Law of Nations do expose these also to the will of the Conqueror, yet ought they for humanity sake to be spared. Our Lawyers do allert, That to be the best and highest Reafon which advanceh Religion. There is an excellent saying in Euripides which makes as well for Religious things, as for things Sacred.

VII. Yea and things that are Religious.
Moderation in wasting an Enemies Country.  

**BOOK III.**

خت اضف به للأتين يت男و面對 صادق من عرش نسب، 

Who conquered Cities rashly do erace, 

And Temples with their Monuments deface, 

Do not forsee the like may be their cafe.

Apollo, ius Tyuanus doth thus interpret that Fable of the Giants fighting against Heaven, 

When and unless men presume to violate the Temples and Images of the Gods. It is said of Scipio, That having taken Carthage he inricht all his Soulliers with the spoil, excepting only those who had before invaded the Temple of Apollo; neither durft Caesar himself (as Dio relates) demolish the Trophies of Mithridates, being confcrated to the Gods of War. 

Cicer one speaking of Marcus Marcellus, thus tellifies of him, Qua victoria profana sacret, religious impudens, non attingit; What the victary had made common and profane, that his Con- 

ferv would not permit him to touch. Adding withal, That there were some Enemies who voluntarily observed the Rights of Religion and of Customs, even in the midst of War. 

And in another place, he declames against the War made by Brennus against the Temple of Apollo as wicked and impious. So doth Livy against that act of Pyrrhus in Plundering the Treasury of Propertius, which he calles Fadurn, in deae superburn facultum; An act of high insolvency against the Gods. The fame Livy bitterly inveighs against the War which Philip made as being wicked, and as if it had been made against all the Gods: Ultra equum 

just viucro in Templo, in Ara, in Sepulchra seciit; For that he spared neither their Temples, nor their Altars, no nor the Sepulchers of the dead: Whereat Polybius alfo glanceing, adds his own judgment in these words, Willfully to destroy those things which can be of no use unto us in War, nor doth much accommodate our Enemies, especially Temples, Images and such like ornaments, who can deny to be an act of brazen-faced madness? Neither doth he herein admit of that common excuse of retaliation. 

Although to speak properly it was not our intention in this place to enquire what is now most in use, but to reduce that loose and inordinate licence in making War, to that which is most agreeable to natural equity, or to that which among things lawful is best; yet will virtue her self, being but little valued in our age, plead mine excuse: If seeing her by her self do deipfied, I endeavoure to set a much greater price upon her, by proposing what great profits and advantages may by her be reaped. In the first place therefore this moderation which spares such things as do not protract the War, doth fo far weaken the Em- 

my, as it disarms him of one of the most forceful engines he hath to destroy us, which is desperation. Archadamus in Thucydides would needs perfwade his Souldiers, That the Enemies Country whereof they were possess, was no other than an hostages or pawn, which the better it was fockey with Corn and Cattle, was the richer and fo the better; great reason therefore we have to spare it, no desperatio hostes redderct invictiores; Left desperation should make them to redouble their valour. The fame Confel did Agesilus in Plutarch follow, when contrary to the opinion of the Acarnianners, he gave the Achaians a free liberty to fow their Corn; faying, That the more they fowed, the fower they would harken to Peace. This is the meaning of the Satyrif, when he tells us, That fociatis arma superfunt; They are compelled to live by force and arms, that have nothing else to live by. This was the usual practice of the Gauls, as Livy notes, who when they had taken a City, would not burn all their houses, that fo they might pacifie the minds of their Enemies by giving them fame things, when it was in their pow- 

er to have destroyed all. Whereunto we may add, That out preferring the Enemies Country during the War, begets in the Souldiers a great affurance of the victorv. For what a man intends, and can make his own, he will not be easily perfwaded to deftry. A- 

gain, Clemency is in it felf apt to fofhen the refulutions and animofities of Enemies, and to draw them to a fubmifion. Hannibal spares all the fields and territories of the Tarentines, but nor (fain Livy) out of modesty or confcience; but rather that thereby he might the fooner gain them to a voluntary surrender. (For to a Conqueror, willt eff elements fame; Nothing is more advantages than the fame of being merciful, especially if the Enemy be any ways dif- 

fident of his own strength.) Thus did Augustus Cesar abfain from all Plunder and Rapine in Pamonia, Because (as Dio gives the reafon) he hoped to conquer them without the leaft effi- 

on of blood. The like doth Polybius tellifie of Timæathus, That by taking care to spare the Country wherein he marched, He got much love and the good opinion of his Enemies. Thus Plutarch commemorating the fame care in Quintus Flaminius when he made war in Greece, adds this as the effect of it, Not long after (fain he) did Quintius reap the fruits of his mo- 

deration and clemency; for as soon as he came out of Theffaly, the Cities yielded unto him: And the Grecians that dwelt in Thermopilæ did earnestly long for his coming: yea and the Achai- 

ans renaming their Confederacy with King Philip, entered into League with the Romans a- 


gainst
CHAP. XII. Moderation in the wasting an Enemies Country.

I. The Goods even of our Enemies Subjects being taken in War are to be detained only after the manner of some just Debt.

II. But not for the punishment of another mans crime.

HE taking of our Enemies Goods in a Just War is neither altogether blameless, nor is it exempted from all Obligations of restitution. For if we respect that which is done rightly, we can neither take nor detain more from our Enemies than what is justly due from him, unless it be such things as (beyond what is due) we are enforced to detain for our necessary safety, which are likewise to be restored (the danger being past) either in kind, or to their full value, (as we have already declared.) For what is lawful for us to do to the Goods of such as are at peace with us, is much more lawful to the Goods of those that are our Enemies. But in the times of Peace, what is necessary for our preservation, may be taken so as it be with a purpose to restore it, as is already proved; this necessity creating a kind of Right to take that wherein we have otherwise no propriety at all. But whereas Debts may arise either by reason of some inequality that there is in things, or by reason of some punishment due for some acts of injustice done unto us, we may in either of those cases possess our selves, if we can, of the Goods of our Enemies; but yet with this difference, namely, In the former of these cases: The Goods, not of the principal Debter only, but those of his Subjects also, by the Law of Nations (as it were by way of Suretyship) stand obliged. Which Right of Nations we conceive to be of another kind than that which consists either in a bare impunity, or by virtue of external Judgments. For as by our own private content or agreement, he that deals with us for what is ours, seeks to have not only an external or judicial Right, but an internal and equitable alfo, in that which he deals for; so is it by a kind of common content or agreement, wherein is virtuously contained every particular mans. In which sense the Law is called the common Tact or Agreement of the whole City. Now it is so much the more credible that it pleased the Nations that such a Right should be thus acquired, because this Law of Nations was at first introduced, not only for the prevention of greater mischiefs, but also as a way whereby every State and Nation might recover their own.

But
But if the Debt wherein a Foreign Prince stands obliged unto us be penal only, I do not perceive that by the content of Nations such a Right is given to detain his Subjects Goods barely for his neglect. For such a tye upon another mans Goods would be odious, and therefore should not extend it self farther than the perfon offending. Neither is there the like profit arising from these latter Debts, as from the former; for the former Debts require some reparation for the los of Goods, but fo do not these latter: and therefore the prosecution of them may without damage be omitted. Neither doth that which we have already said concerning the Attick Law, contradict this. For there men flood obliged, not for that properly, because the City might have been punished; but only to compel the City to do that which it ought to do, that is to, inflict punishments upon Offenders; the neglect whereof is referred to the former, and not unto these latter fort of Debts. For to owe a Duty in punishing Offenders is one thing, and to lye obnoxious to punishment for the non-performance of that Duty is another. The omission of that doth usually induce this, yet so that the former is the cause and the latter the effect. And therefore the Goods of an Enemies Subjects cannot lawfully be possifit by way of punishment. For this were to punish the innocent for the nocent; but such things only are liable to this Debt, that belong to the perons who are Delinquents, amongst whom are the Magistrates themselves, whose Duty it was to punish, but did it not.

Befides, the things belonging to our Enemies Subjects may be taken and kept, not only to reimburse our selves of our original Debt, which was the ground of the War; but to repair our losses and expences in the War, according to what hath been already said in the beginning of this Book. And thus muft we understand that which some Divines have written, namely, That things taken in War are not to be equalled with the principal Debt, that is, until satisfaction be made, according to found judgment, for the damage done in the War it self. Thus the Romans, in their Treaty with Antiochus, adjudged it equitable, That the King should bear the charges of the War, through whose default it was that the War began. So Jufline, Imperfas Belli Legis Jufqua Jusceptum, qui Bellum Author est; He who is the Author of the War, ought by the Law of Arms to bear the charges of it. The like we find in Thucydides, where the Samians are condemned to defray the charges of the War. Now whatsoever is justly imposed on the vanquifhed, may by the Conqueror be exacted by force of Armes.

Moreover, this also muft be remembered, which I have elsewhere deliver'd, That the Rules of Charity are of larger extent than those of Jufitice. That man hath but little of mercy in him, who, being opulent, ufeth the extremity of the Law to inforce from his poor Creditor the umnuml Farthing of what the Law permits, especially if that Debts were contracted by his kindnefs to his friend only, in being Surety for him. Very lamendable were the condition of such a Surety, faith Quintilian the Father. But yet such a Creditor doth nothing herein but what he may do by Right, strictly taken; whereunto he adds, Salvo pudore, ad Sponsorem non alter Creditorum venire, quam si recipere a Debtorre non posset; The Creditor cannot for shame sue the Surety, unless the Principal be infolvent. Wherefore it behoves us for humanities fake, to spare their things, who have no ways offended, either as Author or as Promoters of the War; nor are any other ways concerned than as by way of Suretitly, and who can worse endure the los of them than we can. But especially if it do sufficiently appear unto us, That they shall receive no reparation for what we shall take away from that Prince or City whereof they are a part. King Ptolomy having overcome Demetrius the Son of Antigonus, and taken his Camp, sent back his Money and his Apparel, with this Melfage, That the Contet betwix them was for honour and Empire only, and not for private gain. Thus doth Cyrus bepleas his Souldiers when they had taken Bablyon and plundered it, What ye have got from your Enemies, ye may without any injustice possfet, but if you will leave them those things, it will testify your humanity. This also is to be noted, That since this Right of feizing the Goods of innocent Subjects for their Princes Debt, is but subsidiary, or by way of Suretitly, in cafe there be any hopes of recovering our Debts from the original Debtors, or from them who by not doing us Right, have voluntarily made themselves Debtors, then to fall upon them who are no ways accedible to the injury done us, though it may stand with the Rules of Jufitice strictly taken, yet it cannot stand with the Rules of humanity. The Ancient Romans having conquered their enemies, never made fate of all their Lands, but left them some part thereof to till for their subsistance. So did the Vandals in Africa, and the Goths in Italy, as Procopius informs us. Hiftories do plentifully supply us with such like examples of humanity; as when the Romans having overcome their Enemies, granted them their Fields back, upon Condition, That they should be from thenceforth held of the City they had conquered, or when some small portion of those Lands were for honour's fake left unto the ancient Occupants. Thus Romulus punish'd the Vetciones with the los of a part of their Territories. So Alexander restor'd the

Plut. vit. Demetrii.

Appian, Civil. l. 2.

But not for the punishment of another's crime.

Lib. 3. c. 2.

Book III.
**CHAP. XIV.**

**Moderation concerning Captives.**

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In such places where this Right is yet in force, of taking men Prisoners, and making them Slaves, if we respect internal Justice, it is to be refrained in the same manner as the Right of taking things is; that is to say, It is so far lawful, until we are satisfied our original Debt, together with the subsequent Charges thereof, unless the persons so taken shall be found guilty of such particular crimes as in common equity deserve to be punished with the loss of life. Hitherto therefore, but no farther, hath he that waggeth a just War a Right in the Captives taken from his Enemy, and a power to transfer that Right firmly unto others. But here also the same equity and humanity should perforce we to put the like difference as before we observed, when we discoursed concerning the killing of our enemies. 

**CHAP. XIV.**

**Moderation concerning Captives.**

I. How far forth it is lawful to make men Slaves by internal Justice.

II. What may justly be done unto Captives in equity.

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II. What may justly be done unto Captives in equity.

*Captivum se, non Servum discipul.*

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Plat. viii. Alex.

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De Cen. l. 12. c. 18.

Philem. Epist. 47.
Are thy Servants? yea, and our fellow Servants, if we do but consider what power fortune hath over either of us. And a little after in the same Epistle, Consider that he whom thou callest thy Servant, is born of the same nature, equally to enjoy the same common air, equally to breathe, live and dye as thy self: and if it had so pleased fortune, might as well have seen thee a Slave, as he now fees thee a Freeman. And what we may read in Macrobius, is but the same advice that St. Paul commends unto us, Masters do unto your Servants that which is just and honest, as knowing that ye also have a Master in Heaven. And in another place he admonisheth us, not to terrify them with menaces and threatnings; which he preficeth upon us by the fame argument, because we also have a Master in Heaven, who regards not such distinctions of qualities. In the constitutions of Clemens Romanus we have this advice, Govern not thy man nor thy maid-servant with too much austerity: The reason whereof is given by Barnabas in his Epistle, Left thereby thou slavish against thy self, that thou fearest not him who is the supreme Lord both of them and thee. Clemens Alexandrinus alfo exhorts us to use our Servants as our second selves, Seeing that they are men as well as we, imitating therein that wise Hebrew, If thou haft a Servant use him as a Brother, for he is now a one as thy self.

Let us now admit that the Lord hath over his Slaves the power of life and death to uphold his Domestic Discipline; but then, let that jurisdiction be used with that religious moderation, as the Magistrates use in the publick. This was the advice of Seneca, In thy Bondman thou art to consider, not what thou shalt inflict on him without the restraint of the Law, but what in equity and good conscience thou oughtest to do unto him, which requires sometimes to favour even thy Captive and thy Slave, whom thou hast bought with thy money. And in another place comparing Subjects with Servants, he faith, Though they have different lotter, yet is the licence over both, the same; which certainly holds true in this particular, in taking away the life of either, Majores sofit domini sofrum pufiliam Repubblicam efe vulnerrum; Our Anceftors, faith Seneca, did reckon every family as a little Commonwealth. So alfo Thoby, Every mans house as to Servants is as a City. Infomuch that Cato the Censor, as Plutarch informs us, would not punish any of his Servants for never so great a fault, Nif politquam damnatus effet etiam conferorum judicio; Until he had been found guilty by his fellow Servants. Whereunto we may add that of Job, If I did cause the cause of my servant or of my maid-servant, when they contended with me, what then shall I do when God riseth up and when he visiteth, what shall I answer him? Did not that make him make me, and did not one fashion us both?

Yea, and to jeffer punishment, as stripes and blows, c. e. much of equity and favour is to be shewed to Captives and Bondmen, Thou shalt not oppress him or rule over him with rigour, faith the Divine Law concerning the Hebrew Servant; which since the coming of our Saviour, by reason of that affinity that there is between all mankind, ought to extend to all Servants; upon which Law Philo thus gloeth, Servants in respect of the goods of fortune are our inferiors, but in respect of our common nature our equals. But the rule of Divine justice, faith he, is not that which is allowable to fortune but to nature, Masters therefore are not to behave themselves towards their Servants infensibly, to abuse them which the Law permits them, thereby to grow cruel. For these are fins not of a meek and calm, but rather of a forward and incontinent mind, doming vanity over their Servants in a mannsual way. Prifons comparing the Roman with other barbarous Nations, tells us, That they treated Captives with much more mildly than others did, performing unto them rather the offices of Fathers and Tutors than of Conquerors; For as they lockly withdrew them from those things, which in respect of their own calamities were unlawful; so if they did offend, they only corrected them as sons; but to kill them (as the Scythians did) they esteemed it utterly unlawful. There are divers kinds of liberty indulged unto them by their Lords, and that not only whilst they lived, but at their deaths: for whatsoever dying, they ordain or appoint to be done, with that which is their own, hath the power and force of a Law. Philo in his second Book of Special Laws, as alfo St. Cyprian in his Epistle to Demetrian, highly blames this severity towards Servants, If thou art not readily obeyed in all things (by them) if thy will be not executed as a Law, thou grovest presently impertinent and cruel; thou tormentest thy slave with whips and floggers, thou afflictst him with hunger, thirst, nakedness, and oft-times woundest him and throveth him into Prison; and yet, wretched man that thou art, whilfe thou thus abusest thy power towards thy captivated slave, thou forgivest thy duty to, and thy fear of the Lord thy God. Now what can be more heinous and abfurd, faith Seneca, than to make the condition of a Servant worse than that of a Beast: He that would volutely manage an Herse, will not provoke and exasperate him with many stripes, for unless he be gently handled at the first, he grows fearful and headstrong. And again, What can be more unjustly (faith the fame Seneca) than to exercrize that cruelty upon a man though our Slave, which we would be afhamed to exercrise over Dogs or Oxen. To refrain which brutish cruelty, it was wisely provided by the Hebrew Law, That if a Master did strike out the eye or tooth of his Servant injuriouly, he was for that eye or tooths sake, to let him go free,

III.

That it is not lawful to kill an innocent.

Decem., lib. 1, cap. 18. & Ep. 47.


IV.

Not unmercifully to punish him.

Lev. 25.

In excerp. Legationum.
free, Exod. 21, 26, 27. Whereby it falls out, faith Phile, that the Master undertakes for his cruelty a double punishment in the loss of his Servants, both labour and ransom; whereas we may add a third more grievous than both the former, namely, That thereby he is compelled by the Law against his will to do good in a matter of the greatest concernment to a person whom he hates, and whom he with his heart was in his power everlastingly to vex and torment; whereas the Servant for the wrong he hath suffered, receives this double comfort, first that he enjoys what of all things he most desires, to wit, his liberty, and then that he is for ever freed from the commands of so cruel and severe a Master.

Neither are we to impose upon them too hard labour, without regard had to their strength and health. To this end with some others was the Sabbath by the Mofaical Law instituted, namely, That Servants as well as Beasts might enjoy some refreshment from their labours. Do ye not observe, faith Seneca*, how careful our fore fathers were, as well to prevent all occasions of envy to Masters, as of reproach to Servants, when they fitted the Lord, Pater Familias, The Father of their Family; And his Servants, Familiers, His familiar Friends. So in another place he bitterly inveighs against the too strict execution of Servants labours; where speaking of such, he faith, Nos non tangunt hominibus fed tangunt jumentis abutimus; Whom we abuse not as Men but as Beasts. And Dion Phri/ifentis describing a good King, faith, That he is so far from usurping the title of Lord over his Subjectis, being Freeman, That he will hardly admit of it over his Servants. Ulyfse in Homer profefts, Od. 1. That the lot of his Servants from whom faithful were as dear unto him as his own Son Telemaques, Gratias eff namo potissimis; quam more graces is that natural Total, which inspires Piety than Power; and better it is to be called the Father than the Lord of a Family. Neither is there any other reason, faith Le/chantius, why we call each other Brethren, than because we believe that all are by nature equal. For since we esteem all human beings, not from or by their Bodies but their Spirits, though the condition of the bodies be diverse, yet are they not unto us Servants; but we both esteem of them, and call them in spirit Brethren, but in Religion our fellow-Servants. Thus also St. Augustinus concerning the customs of the Catholic Church, Thus (i.e. the Church) teacheth Servants to adhere to their Masters, not as pretz theys are by necessity, but out of delight they should take in doing their duty. Thus teacheth Masters in imitation of God, who is the supreme Lord and Master of all, to be gentle and merciful to their Servants, and to be always more propriis to exhort and admonish them than by force to compel them to do their duty: And in cafe they transgress, rather to correct them as Sons, than to rage and tyrannize over them as Slaves. The like advice doth St. Hieron, or Paulinus, give unto Cæ/antius concerning Servants, So order and govern thee Herm, as though thou were rather a Master than a Master in it: And invites thy Servants to reverence thee, not by thy sharpness, but by thy meekness and benignity. And St. Augustin observed, That in antient times good Parents governed their Families in this order: As to temporal things the condition of their Children was much better than that of their Servants; but as to Religious duties they made no difference, but Servants as well as Children were with the same affection instructed in the true worship of God: From whence every Master was called Pa- ter Familias, which in time grew so common, That even they that lorded it over their Servants with the greatest severity, would not willingly be called Lords. And for the same reason were Servants called Children, as Servius notes upon that of Virgil, Claudius jam vi- vas pueri, &c. Tacitus commends the Germans, That they made the fame account of their Children as they did of their Dairies or Farmers. And Theven in an Epistle of his, prescribes a just measure for Servants, namely, That they should neither be tired with over much labour, nor weakened through want or poverty.

To Servants for their Labour we owe Aliment; So faith that wise Son of Socrates, Bread, correction and work are due to a Servant. Of the same opinion was Aristote*, The reward of a Servant's work is Aliment. Neither are they much out who command us to use our Servants as we do Mercenaries, Operam exigendi, justa prebenda; By excelling their work, and withal paying what is their due. So provide for thy family, faith Cato, that they be not pined through hunger, nor starved through cold. There is somewhat, faith Seneca*, that a Master owes unto his Servants, that is, Food and Rayment. And in another place, Familia veligia- rium petit voluntae; A Family requires Food and Rayment. For this it is that the Ro- man Captives plead unto Bef/ius, Give us, say they, at the least Food, as we are thy Slaves, not as much as subjects; though our necessities require it, yet so much as may keep us alive. St. Chrys/olos gives this advice to the Master of a Family*, If thy Servant perform his duty labour for thee, do thou feed him; and besides his food, provide that he be well clad and well housed; and this is some kind of service that we owe unto our Servants; for unless thou do this office for him, neither will be his duty to thee, but will remain free, Neque ullam lex constringit nisi alatur, operae praelsare; For there is no law to enforce him to perform his duty, if thou neglect to perform thine. The proportion allowed to every Captive a- mongst the Romans, was four Roman Bushels of Corn for every Month, (every Bush- shell containing of our measure about three Pints and ten Ounces above our Peck) as De...
natur upon Terence informs us. Thus also Martianus the Lawyer, Some things there are which of necessity the Lord must do for his Servant, namely, to provide for him meat and clothing. The Sicilians stand condemned by all Historians for their cruelty in famishing the Athenian Captives. So also doth Iucatus Angelus, for the like cruelty to the Sicilian Captives, as Nicetas records: who also recites an Epitaph sent by the King of Sicily to the Grecian Emperor concerning this matter. Besides, Seneca in the place before quoted proves, That Servants are in some fort free, and in some things able to oblige their Masters by some courtesies; as when they do more than is imposed on them, or when they do some profitable acts, being not commanded, but voluntarily and freely and beyond their duty; wherein, though servants, they perform the office of Friends. As also when a Servant or Slave shall out of his demensum or allowance pinch his own carkas to fave somewhat every day, or by improving his spare time gain something to himself: This is in a manner his peculium, which is (as Theopphilus defines it) his natural Patrimony; as if thou shouldst call the Marriage of a Bond-man with a Bond-woman a natural Marriage. Which Stock Ulpian calls, Patillum Patrimonium, A small Patrimony. Such was that which Vysfer propofeth to Eumenes and Philetus.

Ve{trum} utrique thori socias dabó, largiatar & rem
Vicinalique domos nostras.

Wives for you both, and Goods will I provide,
And Houfes where, near us, you may reside.

Thus also Varro speaking of Servants faith, That by treating them liberally, as by enlarging their proportion in dyet and clothing, by remitting somewhat of their hard labour, or by granting them some little flock of their own to be kept with those of their Masters, they may be made more sedulous, careful and indefatigable than they would be. Neither will it be much to the purpose to say, That such a little stock may at the will of the Lord be either taken away or diminished at pleasure: For in cafe he doth fo without juft caufe, he deals very unrighteously with them. But a juft caufe there may be, not only when it is done by way of punishment, but when it is done to supply the necessity of his Lord; for the Servants profits are more subject to the necessities of his Lord, than the goods of Citizens to the City they inhabit. Very pertinent hereunto is that of Seneca. It will not follow that a Servant hath nothing, because his Lord may chufe whether he shall have anything. And again in the same place, Who can doubt but that the Servant, together with his fock, is the Lord's; yet may the Servant present his Lord with a gift. And hence it is that the Lord cannot re-demand that debt which being due unto his Servant in the time of his fervitude, he pays him after his manumifition. For as Trophonius testifies, Debiti, vel non debiti ratio, in contradictione naturaliter intelligitur; In personal afflunt, the consideration of what is due or not due is to be understood naturally. But possible it is, that the Lord may be indebted to his Slave naturally: As therefore Clients may confer something to the use of Patrons, and Subjects to the use of Kings; so we may read of some Servants who have out of their own small stock contributed something to the use of their Lords: As in cafe he be to raise a Portion for the marrying of his Daughter, or to redeem a Son out of Captivity, or upon fuch like accidents. Pliny indulged this favour to his Slaves, That they might make their Wills, and give or bequeath what they had got unto any, fo they were of his own Family. Among some Nations we read, That a fuller right of acquiring things was granted unto them according to the feveral degrees of fervitude; as we have elsewhere described. And many nations have corrected their Laws, reducing their external right of Lords over their Servants unto that internal justice, which we have heretofore expounded: For even among the Grecians it was lawful for Slaves, being too rigorously treated, to demand, That they might be fole. And even at Rome they might ad Statutum configere; Fly to the Statutes, or implore the aflifiance of the Magistrates in cales of Famine, Cruelty, or any fuch unaffailable injuries done them. And this alo is now allowed, though not in the strictnefs of right, yet as proceeding from the goodness and humanity, and sometimes fuch as may be in equity due; as, That after long and very hard service, they have rewarded that fervice with liberty. So faith Ulpian, After that Captivity by the Law of Nations came to be in force, manumifion became a courtesie. An example whereof Terence gives us:

Thus waft my Slave, till I enfranchis'd thee,
Because thou didst thy duty cheerfully.

In some places it is customary to set a Slave at liberty if he can procure eight times as much as he was bought for. Martianus observes, that in his time it was of frequent use,
That Servants, though not of the belf, yet at least not of the worst kinds of servitude, were rewarded with liberty. And as he adds, were permitted to carry away with them whatsoever they had got in the time of their service. Whereof we have many examples yet extant in our Martyrologies. And here I cannot but commend the generosity of the Hebrew Law, which commanded, That the Servant having served out his time prefixed, should be altogether free, and that he should not go away empty handed: That is, as their custom expound it, that His Gifts should not be less worth than thirty Sicles, (which in our Money amounts to about three pounds ten shillings,) Against the contempt of this Law, the Prophets do bitterly complain. The like doth Plutarch of Cato Major, for selling his Captives, who had faithfully served him until they were almost worn out with Acts, forgetting the common condition of mankind.

But here falls in another Question, namely, Whether a Captive taken in a just War may lawfully make his escape? I do not speak of him that for some particular fault of his own had deserved to be deprived of his liberty; but of him who in the publick discharge of his duty falls into this calamity: Whereunto the best Anfwer is, That he ought not; because as I have said, by the general consent of all Nations, upon the account of the City he owes his labour. Which notwithstanding is so to be understood, unlefs to avoid some intolerable cruelty he be enforced so to do.

We have elsewhere started another Question, Whether or no, and how far forth, the Children that are born of such Captives are by an internal Right bound to him whose Bond-men the Parents are? Which Question in regard of the persons so taken in War, cannot be well omitted. For if their Parents did for their children their own crimes deserve to be put to death; Children that were expected to be born of them are bound to serve for giving them their lives, which otherwise they had never had. For otherwise also even for want of Food and Rayment their Parents had power to have sold them for Slaves, as we have elsewhere showed. Such a Right it was that God himself gave unto the Hebrews, over the Children of the Cannanites. So for the publick Debts of a City, Children already born, as being a part of that City, may fland no les obliged than their Parents. But for those that are unborn, this reason sufficeth not; but some others are requisite: As the expres consent of Parents, together with the neceffity of nourishing them, and that even for ever; or for affording them aliment, and that foi long only until their labour shall fully satisfy the charge of their maintenance. If any Right beyond this be given to a Lord over such Children, it proceeds from the too great indulgence of the Civil Law to the Lords themselves.

But in such places where this Right of making Men Slaves is not in use, there the best way is to exchange Prisoners: And next to this is to release them paying their ransoms, which likewise should not be over great but moderate; Neither can any man set down a certain rate; but common humanity instructs us that it should not be so excessive as that the Prisoner being releaved should thereby want necessaries: which are allowed by the Civil Law, even unto such as through their own peculiar fact are fallen into debt. In other places the ranfome of Prisoners is prefixed, either by mutual covenants, or by the customs of the Countries. Amongst the Grecians of old, the ranfome of a common Souldier was Mina, a Pound, that is of our Coin about three pounds two shillings and fix pence. We now a days require for every Souldier a Months pay. In the War between France and Spain in Italy, the ranfome of every Horse-man was the fourth part of a Years pay, unlefs he were a Captain or some other eminent Commander, or that he was taken in a Juff Fight, or at the forming of a Town, as Mariana testifies. Plutarch records it of the Corinthians and the Megarenses, That the War between them was prosecuted mildly, and as it became Neighbours and Kinmen. If any man were taken Prisoner, he that took him entertained him as his guest, and taking his word for his ranfome diffiult him friendly: whence arose the name ἄνθρωπος, for one that by the courteous usage of his Enemy taken in the War, makes him his friend. But much more magnanimous was that of Pyrrhus, so highly extolled by Cicero:

No wealth I ask, nor ranfome will I tak
'Tis Steel, not Gold that must the Victor make
Yet, whomso after Fight shall chance to live,
To him his liberty I'll freely give.

Pyrrhus thought no doubt that his caufe was good; but yet he was content to restore them to liberty, whom some probable reafon had induced to fight against him. The like fact of Cyrus, Xenophon highly commends: As Polybius doth that of King Philip: And Cyropæ. 1. 2.

Cartius that of Alexander: Plutarch also records the fame of King Prolomy, and of Demetrius, vii. Demetr. X X X X.
Moderation in acquiring of Empire.

BOOK III.

CHA P. XV.

Moderation in the acquiring of Empire.

I. How far internal justice permits the acquiring of Empire.

II. That by this Right to spare the Conquered is laudable.

III. Either by mixing the Conquered amongst the Conquerors.

IV. Or by leaving them under their Government, who before had it.

V. Yet sometimes placing Garrisons amongst them.

VI. Or by imposing on them tributes and such like charges.

W H A T in equity is requisite, or in humanity commendable, being done to single persons, is so much more being done to a Nation or any parts of it; by how much the good or evil that is done to a multitude, is more notorious than the same done to particular men. Surely by a just War, as other things, so also the Right of sovereignty over the people, and the very Right that the people have in the Government may be lawfully acquired; that is to say, so far as the greatnes either of the punishment due to their crime, or of some other debt doth warrant it. Whereunto we may add so far as is necessary to secure the Conquerour from some great and imminent danger that otherwise may befall him. But this Caufe is for the most part mixed with others, which notwithstanding as well in making of peace, as in profecuting the Victory is principally aimed at. For in the other caues that the Conqueror remits the punishment or debt, it is from his mercy. But that security which in publick dangers exceeds moderation is cruelty. Thus doth Socrates advise Philip, It will justify thee so far to subdue the Barbarians, that thou may'st secure the Peace of thine own Country.

That which Sallust records of the Ancient Romans is worthy of our imitation, namely, that they were for Religious, That they took nothing away from the conquered, but the license they took to do them wrong. And in another place he tells us, That wise men make War for Peace sake, and for labour in hopes of reft? Sapientes pacis causa Bellum gerunt, & laborcem fpe otiu fultantem. Not much disprais is that of Aristotle, The end of War is Peace, as the End of Motion is reft. To the fame purpoe is that notable laying of Cicero, Bellum uti sofpetiatur, ut nihil bland nef Pacque videretur, War should be so made, as if nothing else were thereby intended but Peace. And in another place, War should be undertaken for this cause only, that we may live in Peace and not be injured. Nor is this much different from what our Christian Divines teach us, The end, fay they, of War is to remove those things that disturb Peace. Before Ninnus his Raiges, Kings were fudious to preserve the bounds of their own Empires, but not to enlarge them. Thus Alexander wrote to Artaxerxes the Persian, Manendum conque intra fines nos nihil novando; Every King ought to confine himself within his own Dominions; and not impose upon another; neither should any man, out of an uncertain hope invade the right of another, but reft contented with his own. All Kingdoms were at first limited with their own bounds, neither were Kings so Ambitious of Empire to themselves, as of glory to their People; and if they did make War it was not for Dominion, but for the honour of the Conquest. Now unto this Ancient Cavilo it is, that St. Aug. laboured as much as in him lay to reduce us, Let Princes (faith he) consider, that it belongs not to good Kings to take pride in the enlarging their Dominions; for as he there adds, Major est falsitas vicinum libere concordem, quam malum subjiciere bellamentum; It is greater happiness to have a good Neighbour that is peaceable, than to subdue a bad one that is troublesome. Upon which account it was that St. Cyril commends the Hebrew Kings who always contented themselves...
felves with their own bounds, without encroaching on their Neighbours; which was the very fin for which the Prophet Amos did so severely reprove the Ammonites.

Near unto this original draught of innocence, comes that prudent moderation used by the old Romans: What, faith Seneca, had our Empire been, had not a wholesome providence taught us to intermix the Conquered with the Conquerors? Our great founder Romulus, as Claudinus in Tacitus tells us, did so prevail by his wisdom, that many people, whom the rising Sun saw his Enemies, the setting Sun saw his Subjects and Citizens. Neither was there any thing that did more ruin the Lacedemonians and the Athenians than this, That they always drove away the vanquished as Strangers. Livy informs us that the Commonwealth of Rome was much augmented by the reception of the Conquered into their City, whereof Histories afford us plenty of examples: As of the Sabines, the Albanes, the Latines, and fo of the rest of the Italian Nation; till at length Caesar first led the Gauls in triumph, and afterwards admitted them to be of his Court and Council. Cæsar in Tacitus thus bespeaks the Gauls, Ye your selves are usually invited to command our Legions; Ye are they that govern not this only, but others of our Provinces, there are no places of trust from which ye are excluded; wherefore (as he there infers) ye ought in all reason to endeavour all you can to preserve that life and Peace, which ye, though vanquished, do equally enjoy with us the Victors. Nay, which is yet more admirable by the decree of the Emperor Antoninus, all that lived within the Circle of the Roman Empire were made Citizens of Rome, which are the very words of Ulpius: whereupon Rome was then accounted, as Modeftius affirms, Communis Patria; The common City, or every mans Country. Whereof Claudinus thus,

_Hujus pacificis debemus moribus omnes,
Quad cuncti genti una famus._

To th honor of this Prince it may be said, That of the World he but one Nation made.

Another kind of moderation used in Victory, is when the Government is left in the same hands, either of King or People who hold it before the Conquest. Thus Hercules be speaks King Priamus,

_Heatis parvi virili lacrymis,
Subjice dilexit, rector habens,
Paritque fede celus folio:
Sed sepra fide meliore tene._

By a weak Enemies tears ore'tane,
Take, faith he, thy Crown again,
Attend thy Fathers Throne on high:
But henceforth rule more moderately.

So also the fame Hercules, having conquered Neleus, gave his Kingdom to Neleus his Son. Thus the Perian Kings were wont to leave their Kingdoms to the Kings whom they had conquered, contenting themselves with the bare Victory. Thus did Cyrus to Armenia, Alexander to Persia. And this is it that Seneca highly commends in a Conquerour, _Nobil ex rege victo praeclar gloria loviere; To take nothing from the Conquered besides the honour of the Conquest._ This is triumph over Victory itself; and to declare that there was nothing to be found among the Conquered worthy of the Conquerors acceptance, but the Conquest itself. Thus Pompey having overcome Tigranes, left him a part of his Kingdom to govern, as Euphrates informs us. And herein is Antigonus extold by Polybius, That having brought Sparta under his absolute power, he gave the Citizens the free use of both their Ancient Laws and Liberties; for which Act his praisef were highly celebrated throughout all Greece. Thus did the Romans give unto the Cappadocians whom they had conquered, a power to use what form of Government they pleased; and many Nations we may read of, which being Conquered, were not withstanding left free. Thus was Carthage left at liberty to live under their own Laws, as the Rhodians pleased to the Romans after the second Punic War. And when the Aetoliands told Quintus, that there could be no firm Peace until Philip of Macedon were driven out of his Kingdom: He answered, That they were too severe in their censures, as being unmindful of the common suffrages of the Romans, who for the most part spared those whom they had in their power, adding this withal, _Adversus volles mistifi-

 Lump quenque maximum animam habere: That he who was mildest towards the Conquered was ever held most magnanimous._

Sometimes
Sometimes though the Empire be restored, yet the Conquerour's security is also provided for. Thus it was ordained by Quintius, that the City of Corinth should be restored to the Achaian; but withal, That there should be left a Garison in Accrocinthus, which also was afterwards withdrawn; and that Chalcedes and Demetriades should be detainted, until all fear concerning Antiochus should cease.

The imposition of Tribute is oft-times, not only for the defraying the charges of a War but, for the mutual security of both the Conquerour and the Conquered for the time to come. Cicero, in his Epistle to his Brother Quintus concerning the Grecians, writes thus, Let Aliu also consider, That unless She be secured by the Roman Power, She can never be without a Foreign War, or Demastick Brutal: And since this Power that secures her cannot possibly subsist without Tribute, good reason is it That She should be contented, with some part of her wealth, to purchase to herself perpetual Peace. Thus doth Petilius Cerealis in Tacitus plead for the Romans, with the Langres and other Gauls, We, say they, though often provoked, yet by the Right of Conquest do offer unto you one only Condition of Peace, namely, That ye pay your Tribute. For Peace among Nations cannot be defended without Armes, nor Armes without Pay, nor can we pay our Souldiers without Contributions. Hereunto likewise we may refer those other things mentioned before, where we discoursed concerning unequal Laws, as the Delivery of Armes, of Fleets, of Elephants, the prohibiting the use of Armes, the raising of Armies, and such like, whereby the Conquerour may be secured.

But that the Conquerour should leave the Conquered pooffe of his own Kingdom, stands not with humanity only, but sometimes with policy. Among Numa's Laws this is commended for one, That in those Sacred Rites wherewith they worshipp'd their God Terminus, he would have no blood spilt; thereby intimating, That nothing could more conduce to a lasting Peace between Neighbour Princes, than to content to live themselves within their own Bounds. It was very well said of Florus, Difficile est Provinciarum obtenire, quam facere; viribus paramur, iure retinentur: It is much more difficult to keep Provinces, than to make them; for they may be gained by force, but must be kept by jusifice. Not much unlike is that of Livy, ... parari... quam teneri universa; Particulars are more easily gained than Universals kept. Nor that of Augustus in Plutarch, It is better to govern our own men, than to be poifes of a greater Empire. Whereunto we may add that Saying of Darius's Ambassadoour to Alexander, A foreign Empire is full of danger: Thou wilt find it very difficult to hold those men not grasp: Some things may be easily gained, yet so easily kept. How ready are our hands to catch at that, when which they have, they cannot hold? Which Calanus the Indian, and before him Oebarus, Cyrus's Friend, did very well emblaze out by a dryd Ox's Hide, which being preft down with our feet on the one side, riseth instantly on the other. And Titus Quintius in Livy by a Tortoise, who whilist he gathers himself up within his Shell is safe, but as soon as he thrusts out any one part he is expost to danger. Plutarch thus relates, That when the Achaian consoled about the taking of the Iland Zant, he dissuading from it, told them, That it was a dangerous attempt, if like the Tortoise they thrust their head beyond Peloponnesus. And herein is that of old Hesiod verified, which Plate likewise thus applies, Dimidium plus tota, That sometimes it is better to take up with the half, than to cover the whole. When some Nations, as Apian notes, would willingly have annexed themselves to the Roman Empire, they were refused: And over other Nations they thought it fitter to appoint Kings, than to unite themselves as Provinces. And in the judgment of Scipio Africanus, the Roman Empire was in his time of so large an extent, that as to effect more might well be thought greedines; so if they could but keep what they had, they might be abundantly happy. Wherefore that Prayer, whereby in their solemn purgations they invoked the Gods to profer and enlarge their Empire, he so changed, that he prayed only, That they would preserve it in perpetual peace and safety: which the Emperor Augustus thought worthy his imitation; and is therefore commended by Dion, for that he did never attempt any new Conquest, esteeming that which he had already got to be sufficient.

The Lacedemonians, yea and the Athenians also, in their Golden Age, never challenged the Sovereign Power over any City that they took by War; only they required that they should mould their Government according to their own Form. For the Lacedemonians used an Aristocratical Government, wherein a few of the best governed the rest. But the Athenians used a Democratic, whereby the Government was wholly settled in the People; as Thucydides, Iosevates, and Demophenes teach us. Nay Aristotle himself confirms as much in several places. Tacitus records the like done by Artabanes at Seleucia; Who signified the Government of the Common People to the Noble-men, according to his own use and custom: For he judged it the next way to Liberty to leave it in the People, as to leave it in a few was the next way to Tyranny. But whether these alterations in Government do conduc any thing to the security of the Conquerour, is not our purpose in this place to determine.
But in case it be not thought safe for the Conqueror to leave the Conquered altogether free, yet may the matter be so moderated, that some part of the Government may be left to them, or their King, with a reversion of some other part to the Conqueror. 

Tacitus tells us, That it was the manner of the Romans to make use of Kings themselves as Instruments of subjection. Antiquus is said to be, Romanis infereservitium Regnum divisimum, The noblest of all the Kings that were subject to the Romans. The like we read in the Commentaries upon Melaonius, namely, Of some Kings that were subject to the Romans. So in Lucan,

Arque omnis Latio qua servit purpur a Ferro.

And every King whom Rome's vast Power commands.

Thus did the Scepter continue amongst the Jews in the Sanhedrim after Archelaus's confiscation. And Cesar, King of Cyren, (as Diocterus tells us) told the King of Persia, That he would obey him, but as one King obeyed another. And when Darius was overcome, Alexander was willing to restore him to his Kingdom, but upon this Condition, That he might command others, but obey him only. Such Kings there were also antiently in Italy, who though they ruled others, yet were themselves subject to other Kings. So in Asia, that among the Persians, there were, Reges, Regis magni subjectes; Petty Kings, that were subject to the great Kings. As there are now also among the Turks. Now as concerning the manner how an Empire may be mixt, we have already treated; but sometimes a part of a Kingdom being taken away, the reft is left to the Conquered, as is usual after the Conquest to take away some part of the Fields, and to leave another part to the ancient Occupants.

Yet when the Conquered are altogether deprived of their Empire, may there be left unto them power over their private Extates, and some smaller things that are publick; as their own Laws, Culloms and Magistrates. Thus Philo in his Embassy to Caius's dear Father, Augustus was no less careful to preserve the Laws peculiar to every Nation, than to preserve the Laws proper to the Romans. So we read also in Polybius, that in Bithynia, about a Proconsular Province, the City Apamea's enjoyed this privilege, That they governed their Commonwealth at their own pleasure. And in another place he tells us, That it was granted them, that they might chuse their own Magistrates, and their own Senate. The City Sinope, though under the Persian Monarchy, was yet permitted to live under a popular Government, as Apamea's tells us. Such another shadow of liberty the Grecians enjoyed under the Romans. And Cicero confesseth, That though the Romans had conquered Cyprus, yet it was not lawful for the Romans to call the Cypriots out of their own Island. So likewise in Pontus, The City of Amiones, by the favour of Lucullus, retained the use of their own Laws. And the Goths, though they had conquered the Romans yet they, changed not the Roman Laws.

Another favour may also without danger be granted to the vanquished, namely, The free exercise of their Religion, and not at all to withdraw them from it; unless it may be done by persuasion: which, as Agrippa in his Oration to the Emperor Caius proves, is both grateful to the Conquered, and no ways prejudicial to the Conqueror. And this was it that, as well Josephus himself, as the Emperor Titus objected against the rebellious Jews at Hierusalem, That through the indulgence of the Romans they might exercise their own Religion with so great a right and freedom, that they might drive Strangers out of their Temple, even with the peril of their lives. But in case the Religion of the Conquered be false, yet may the Conqueror make it his care that the true Religion be not oppressed. As the Emperor Constantine did, by weakening Licinius's Party; and as the Franks and other Kings did after him. And although we cannot persuade them to the worship of the true God, yet must we not drive them from the worship of their own. For, to use the words of Severus, Melius est ibi aliquem colere Deum, quam nihil. Better it is that any God be there worshipped, than none at all. Thus the Goths in Procopius profess, That they would not compel any man to embrace their Religion, but leave them to their own.

The Ift Premonition is this, That where the Empire is fully and absolutely got, the Vanquished should be treated with much kindness and clemency, and so as may stand with the mutual good both of the Conqueror and Conquered. Cyrus in Xenophon bids the Affyrans, whom he had overcome, to be of good cheer, for their condition should be the fame as before; for they should only change their King, but their Houses, Fields, Wives, Children, &c. should as fully remain theirs, as they were before. And if any man should wrong either them or theirs, he and his would revenge their injuries. We read in Salutis, That the Romans always sought to engage men as their friends, rather than as their Slaves; thinking themselves more safe in a free than in a compulsory obedience. Thus we read
read of the Lacedemonians in Thucylides, We, say they, are of opinion, That our worst En-
emies may thus be made our best Friends, not if the one Party thriving only for revenge, and ad-
suming his good fortune, shall endeavour to bind the other Party by Oaths, to Conditions manifestly
inequal; but if (though he may so do) he shew no less equity in conquering his own passions, than
he did courage and conduct in conquering his Enemies; using his Victory with as much moderation
as may stand with his own security. The Britains in Tacitus's days did readily make their
Levis, pay their Tributes, and perform all Duties enjoined them by the Romans, so long
as they were not provoked by manifest injuries; but such they bare very impatiently, Jam
domiui ut parentem, nondum ut servirent; Being already so far conquered as to be Subjects, but
not so far as yet, as to be Slaves. That Pincernas in loco, who was asked in the Roman Sen-
ate, What manner of Peace it was that the Romans might expect from him? answered
readily, Si bonam dederitis, & fidem & perpetuum; si malam, haud dictumnam: If on rea-
sonable Conditions, that which was firm and lasting; if otherwise, not very durable. Adding this
Reason, No Nation, and indeed no man, will remain longer in such a Condition whereof he re-
pents that he is fallen into, than necessity shall enforce him. So Camillus was wont to say, That
was the most lasting Empire under which the Subjects rejoiced. Thus the Scythians answere
Alexander, Between the Lord and his Slave there can be no true friendship; for though they live
in peace, yet there still remains some Rights of War. Thus likewise Hermocrates in Diodorus,
To overcome is not so glorious as to use the Victory with clemency and moderation. Whereunto we
may refer that excellent Saying in Tacitus, Bellorum egregii fines,quoties ignosce transfugit;
The effeRts of those Wars are notable which are shut up with a General Pardon. For as Cesar ob-
erves, Hac nova sit vincendi ratio, ut misericordia & liberalitate nos mutuamus; This is a
new way of conquering, when we secure our selves by our acts of mercy and liberality.

CHAP. XVI.

Moderation concerning such things as by the Law of Nations want the benefit of Postliminy.

I. That what is taken away by an enemy in an
unjust War, ought in equity to be restored.

II. Examples.

III. Whether any thing may be deducted.

IV. That even a people being subject, or any
part of them, if by an unjust War, are to
be restored to them whom they formerly were.

V. In what space of time this obligation to re-
stitution ceaseth.

VI. What is to be done if the Case be dubious.

HOW far forth in a just War things taken away may be his that takes them, hath already been declared; from which are to be deduced such things as are received by the Right of Postliminy: for these are as if they had not been taken. But the things taken in an unjust War (as we have said before) are to be restored, not on-
ly by those that took them, but by others also unto whomsoever they shall by any means
come. Nemo plus juris ad illum transferre posset, quam ipse habuit; No man can transfer
more Right to another than he hath himself; say the first Founders of the Roman Laws, which
Seneca thus briefly explains, Nemo posset dare quod non habet, No man can give what he hath
not. But he that first took them had no internal Right or Property in them; wherefore
neither shall he have any that hath not a Title to them, but what he derives from him.
Now that Dominion which the second or the third Occupant hath gained, we call exter-
nal; that is, such an advantage that he is every where to be defended in it, by all judicia-
ry Power and Authority, as if he were the first Owner. But yet, if he plead this Right
against him, from whom the thing was at first unjustly taken, he deals not honestly. For
look what Answere some eminent Lawyers have given concerning a Servant, who being
first taken by Robbers did afterwards escape unto the Enemy, namely, That it was true
that he was taken away, neither was his having been amongst Enemies, nor that he
did return back by Postliminy, any impediment unto him as to that thing. The very fame
Answere from the Law of Nature may serve concerning him who being taken in an unjust
War, and afterwards either in a just War, or by some other means, comes under the power
of another. For, as to that which we here call internal Right, there is no difference be-
tween an unjust War, and Piracy or Robbery. And according to this opinion did Grego-
rius Noceflariensis frame his Answere, being consulted with concerning the Goods of some
of his Citizens, which after they had been taken away by the Barbarians, were received
by some of the Inhabitants of Pontus.

Wherefore
Wherefore things so taken ought in honesty and confidence to be restored to their first Owners, as being unjustly taken away, which we see frequently done. Livy having declared how the Volsci and Aegina had been conquered by Lucius Lucretius Triarius, faith, That the spoil was brought and exposed to public view in the Field of Altar, that every man might within the space of three days find out his own, and take it away. The same Livy in another place, having related the Victory got over the Volsci by the Dictator Publius, tells Us, That he restored a part of the spoil to such as knew their own, of another part whereof he made Portake: And elsewhere he tells us, That two days were allowed for every man to come in, and to lay claim to his own Goods. And in another place, Having related the joyful Victory which the Sammites got over the Campani, wherein there were taken seven thousand four hundred of them Prisoners, and a very great Booty from their Associates. He likewise tells Us, That the right Owners were summoned by Proclamation to come in by a certain day, to find out and receive back their own Goods. The like fact he records of the Romans, For the Sammites, endeavouring to possess themselves of Interamna, a Colony of the Romans, but not able to keep it, having plundered the City and depopulated the Country, and driving away before them an infinite number of Men, Cattle, and other things, fell unexpectedly into the hands of the Roman Conslul in his return from Luceria, who recovering the spoil, and pursuing the Sammites with great Slaughter, at last exposed all he had got to open view, sending out his Edict, That every man might come in and receive his own. The same Author speaking of the Prey taken by Cornelius Scipio at Hippa, a City in Portugal, faith, All which being exposed to view before the City, every man had leave granted to search out and take away what was his own, the rest was delivered to the Quoex to make sale of, which was presently done, and the money divided among the Soldiers. So again, after the Battel fought by Titus Gracchus at Beneventum. The whole Prey, except the Prisoners, was divided among the Soldiers; but the Captives were preserved, which the right Owners had liberty given them within thirty days to find out and to recover. The like doth Polybios record of L. Aemius, Who having conquered the Gauls, releas'd all the spoil to them from whom it had been taken. The very same doth Tacitus, Appian and Dio Cassius tell us of Scipio the African, who had taken Carthage, to fund their many rich Prentices which the Carthaginians had taken from the Cities of Sicily, and elsewhere, and brought thither: With whom agrees V/.taurus Afrancus concerning the fame Scipio. Whole humanitie, faith he, was such, that having taken Carthage he sent Letters to all the Cities of Sicily, That they might by their Ambassadors receive back all the Ornaments of their several Churches, which the Carthaginians had taken from them; which he dehired them to take care of, and to set them up in their former Stations. The like testimony doth Cicero give us of the Carthaginians, faith he, did formerly possesse themselves of Himerœ, one of the beauteous and best adorned Towns in Sicily; Scipio observing it an all worthy of the Roman People, took care that it should be restored back, and Carthage taken, all the ancient Ornaments taken at any time from the Sicilians should be restored unto them. Thus did the Rhodians restore four Ships to the Athenians, which they had recovered from the Macedonians, who had formerly unjustly taken them from the Athenians. So likewise Tertius the Aetolian, as Livy records it, thought it fit that all that before the War began had been the Aetolians, should be restored unto them; which Titus Quamin did not deny, but had the demand been only of Cities taken in War, and had not the Aetolians first broken the Laws of friendship. Nay even tho' Goods that were at first consecrated to the Temple at Ephesus, which afterwards their Kings made their own, the Romans caufed to be restored to their former condition. But what if such Goods so taken shall come unto us by way of Commerce, may we not charge him from whom they were taken with so much as they cost us? We may, as we have already said, so far forth as the recovery of the possiclion of things so impartially left, would probably have cost him from whom they were taken. And if the charges may be required of him, why may not our labour and peril also be valued, as if a man should recover some precious jewel of another man out of the Sea, by diving unto the bottom? Very pertinent unto this is the Story of Abraham's return from the Conquest of the five Kings, Reduxit annes illas rei, He brought back all those things, faith Moses (i.e.) which the Kings had taken away. Neither can we refer that Offer which the King of Sodom made unto Abraham, of restoring the men, and detaining the Goods to himself, to any other cause than this, That those Goods should be the reward of his pains and peril. But that Abraham refused to take any thing to himself of the Prey, was an Argument of his, no lefs pietie than, magnanimity; which was very well oberved by Jesuschrist on the fifth Chapter of Daniel. Nevertheless, of the things so recovered, he gave the tenth to God, as being due to himself by the reafon of his necessary charges, and some portion thereof he was willing should be given to his Companions. St. Ambrose, speaking of this generous act of Abraham, faith, The reward which he refused from men he receiv'd from God. And Sulpicius speaking of the rest of the spoil, faith, That Abraham refused it to thee from whom it was taken. Not much inferior to this of Abraham's was that Heroick Act of
Pistaces the Mytilenian, recorded by Valerius Maximus. Whose being offered by the general consent of his Countrymen the one half of the Land taken from the Athenians for his good conduct, utterly refused it; accounting it a dishonour to fully the Glory of his Victory, by receiving so large a part of the spoil.

As things taken in an unjust way are to be restored to their right Owners, so a people or any part of a people ought to be restored to him or them who had the Right of Government over them, or even to themselves, if before any unjust force was used against them, they were a free people. Thus we read of the exiled Saguntines, That after six Years they were restored by the Romans *. So Anthony in the War of Cæcilius set at liberty all those that were made Bondmen, and commanded their Goods to be restored unto them. Thus also was Calatrazia restored by the King of Carthage and others to the Souldiers, from whom the Moors had before taken it †. And so also was Sattrum taken and restored in Carthage's time, as Livy testifies *. The Aeginae and Melii were likewise restored to their Cities by the Lacedemoniæ. The Cities of Greece, which had been subdued by the Macedonians, were set at liberty by Flaminius; who in the Treaty he had with Antiochus's Ambassadors, insisted on this as a Point of Equity, That the Asian Cities, which were called by Greek Names, should be restored to their liberty; which Seleucus, the Great Grandfather of Antiochus, had taken by force, and which afterwards, being lost, were re-taken by the fame Antiochus: For, faith he, those Grecian Colonies were not sent into Æolia and Ionia to be enslaved by the King; but for the increase of the Greek Race, and to propagate that ancient Nation throughout the World.

It is sometimes questioned, How long a time is required before this Obligation to restitution ceaseth? But this Question, if it happen to arise between Subjects of the same Empire, is best determined by their own Laws; that is, in case those Laws will admit of this Internal Right, and not of that only which is External: which by a prudent inspection into the words and purport of those Laws may be collected. But in case it be between such as are strangers to each other, then it must be determined by a sole conjecture of the former Owners dereliction, whereof we have sufficiently spoken as far as is fit for our purpose.

But if the Right of War be very ambiguous, it is best to follow the Advice of Aratus the Sicilian (as King Ferdinand did *) who in part persuaded the new Occupants to accept of present money, and to yield up their possessions; and in part persuaded the ancient Lords to accept of the value of their Lands, rather than to hazard the recovery of them.

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* Lib. 6, c. 25. n. 1.
See above
Book 2. Chap.
Book 3. Chap.

† See above
Ch. 10. Sect. 6.
* Lib. 34.

Lib. 2. c. 4.

VI.
What if the Right of War be dubious?
* Marius lib.
29. c. 14.

CHAP:
CHAP. XVII.

Of Neuters in War.

I. From Neuters nothing is to be taken away, but in extreme necessity; nor then without restoring the full value.

II. Examples and Precepts of such abstinence.

III. What the Duty of Neuters are to such as are at War.

Though it may seem impertinent here to treat of such as are not concerned in War, because against these it is plain, That War hath no Right at all; yet seeing that many outrages are committed, and many injuries done against such, if Borderers, (by reason of the War) upon pretence of necessity; it will not be much amiss briefly to repeat here what hath elsewhere been delivered more at large. In the first place therefore we must remember, That it is required that that necessity that gives us a kind of Right to that which is properly anothers, must be extreme; Secondly, That there be not a like necessity in the right Owner of the thing; Thirdly, If there be such an extreme necessity, it is plain that we ought to take no more than what our present necessity requires. As for example, If the bare custody be sufficient, we ought to forbear the use; if the use be necessary, we ought to forbear the abuse; if the abuse be necessary, we ought to give the full value of it to the right Owners.

As Moses being necessitated to pass with his Israelites through Idumea, promises first to pass only through their High-ways, and not to hurt either their Fields or Vineyards; and in case they should want water, they would pay for it. Tho' some Famous Generals, both of the Greeks and Romans, did the same. The Greeks in Xenophon under Clearchus promise the Persians, That in passing through their Country they would offend no man. And if they might be supplied with necessaries for their money, they would not forcibly take either Meat or Drink from any man. Thus did Dercyllides pass with his Army through Countries that were quiet, without offence given to the Provincials. Levy testifies the fame of King Per- fious, That he passed into his own Dominions through Phthiotis, Achaia and Thesly, without any damage or injury done to the Country through which he past. The self same doth Plutarch testify concerning the passage of the Army led by Agis the Spartan into Peloponnesus, It was a pleasant Spectacle, faith he, to all the Cities of Greece to see how civilly and insouffently they marched, and almost without noise. The like Testimony doth he give to Titus Quintius Flamininus. Thus Velleius writes of Sulla, That he led his Army through Calabria and Apulia into Campania, so orderly, and with such singular care of their Fruits, Fields, Cities and People, as if he had come into Italy, not as one meditating revenge, but as a Peace-maker. Tully speaking of the Great Pompey, faith thus, Whose Legions came into Asia, so insouffently, that neither the Iris bands of so great a multitude, nor the print of their feet, were observed to hurt any that lived placidly. And understanding that some of his Souldiers had misbehaved themselves in their March, Sigillum Gladiis eorum imposuit, quod qui vos cujufdetis, est punicator; He sealed up their Swords in their Scabbards, which Seal whosever brake was severly punished. Fronti- nus thus testifies of Domitian, That he being about to raise new Forts and Caffles upon the Frontiers of the Ubbi, he caufl all the Fruits growing within the places which he intended to intrench, to be first apprized and paid for, and thereby got himself so great a fame for his Justice, that every man was willing to trust him. So likewise Lampridius concerning the Partian Expedition of Alexander Severus, tells us, That his Army was so well disciplined, and bore so great a reverence to his Person, that they feared rather Senators than Souldiers. For the Tribunes were so ready, the Captains so modell, and the Souldiers themselves so friendly, that the Country-people wherever he came, for those many and great benefits they received from him, honoured him as a God. The Panegyrick, speaking of the Goths, Vandals and Alanes that served under the Emperor Theodorus, faith, That in that Army there were no such tumultus, nor such confusion, nor such robberies committed, as were among the Barbarians; but if at any time there happened to be a scarcity of provision, they sustinad it patiently, leaving every man's dimension or proportion, as either their numbers increased, or their Stores decreased; which very praiseful Cadi- dian gives unto Silico:

Tanta quiet, tantisque mentis, Severat honesti,
Te moderate sui, nullus in Vinea fortii
Ant fuges crepta fraudaret Messe Colonum.

V y y 2

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Concerning the singular modesty of the Goths in their Wars, we find many rare testimonies in Cæsiodore, but especially in the twenty fifth Epistle of the eleventh Book, where he brings in the Emperor giving his charge to his Souldiers, To shall defray neither the Corn nor the Meadows in your march towards us; but ye shall haften hither without giving offence to any, that so your access unto us may be acceptable, who for this very reason do freely undergo the whole charge of the War, that so you may preserve the reputation ye have gained by your civility, unblemished. The like testimonies doth Suidas give of Belisarius, whose admirable discipline is so celebrated by Procopius (as being both his Companion in Arms, and a witnefs and strict observer of all his Actions) whose excellent speech to his Souldiers, as they were marching into Africa, is worthily recorded by Procopius in the first of his Vandal Wars. But that which he records of him in the third of his Gothics, deserves to be here inferred, whose words found to this fence, So great was his care of Husbandmen, that no violence was at any time offered unto them, whilst Belisarius was their General; but on the contrary, the Provincials grew rich whatsoever he came with his Legions; for they sold them necessaries at their own rates, and when the Corn grew ripe, his care was doubled, that the Horse-men should not spoil it, nor were any of his Souldiers permitted to pluck so much as an apple from the trees. The like discipline Gregorius extols among the Venetians; Where justice and magnanimity seemed to contend for mastery, no man being permitted to frugle from the Army, or to take away any thing but what he bought with his money: which might cally be done where there was plenty of Provision, the Army well paid, and a strict discipline constantly observed, whose principal Law is, That the Countries with whom we have Peace should not be wasted. Whereas, faith Pliny *, did the Roman Generals make it their greatest care in their Wars that there should be freedom of commerce? Whereunto Cæsiodore gives this answer †, Ut habet miles quietiam, ne cognat cognitum quietiam alterum: That when the Souldier wants he may buy, which otherwise he should be enforced to steal. Vopisius brings in the Emperor Aurelian giving this charge to his Souldiers *, Nemo pullum alienum rapiat; Let none of you presume to take away a Chicken or a Sheep of another man; let none of you presume to trample down the Corn, to pluck a Grape, or forcibly to require from any man either Oil, Salt, or Wood, &c. So likewise in Cæsiodore, Vivant cum Provincialisbus, juris civilis; nec indebita animus qui se fentic armamentum: Let the Souldiers live with the Provincials according to the rules of the Civil Law; neither let them grow insolent because they know themselves to be armed, for the contents of our Army ought to protect our friends in Peace. Appolit whereunto is that of Xenophon, No Cry that is at Peace can be compelled to give us anything against their will. By all which wise precepts, we may the better understand those caution which the great Prophet gave unto the Souldiers, who demanded of him what they should do, Luke 3. 14. namely, Offer violence to no man, accurse no man falsely, and be content with your wages. Where, by the way we may observe, that the words here translated accurse no man, may as well be translated (as it is elsewhere) Oppress no man, or, Defraud no man, as will appear by the Greek Version of the same word, Bobi 35. 9. and other places. And by the vulgar Latin, Luke 19. 8. Agreeable whereunto is that of Aurelian in Vopisius, Let the Souldier be content with his allowance, and let him chuse rather to enrich himself with the spoil of his Enemies, than with the tears of Strangers. There are many excellent Penal Laws in Gregory Turonensis to this purpose. That of Frederick the first, Gunther thus translates,

Si quis pacifice plebis villasue domos
Exserit, adrefis signaburis orta capiliis,
Et pulfus castris, posq verbera multa recedit.

Who peaceful Countries waffe or Houfes burn,
B'ing branded in the front with Hair all thorn,
And imparit whip, fhall from the Camp be turn'd.

Neither is there any reaon that any man should think that these things thus generously spoken cannot be done; for neither would so holy a man as St John was, advise, nor so many wise Law makers command that which they believed to be impossible. Besides, what we have been done, we must needs grant may be done; but that it hath been done we have already proved by many examples. Whereunto we may add that notable one of Frontinus (recited out of Scuarus) Of an Appletree hung full with fruit, which happening
happening to stand within the compass of ground whereon the Camp was that day pitched, was the next day, the whole Army being gone, left with all her fruits untouched. And that exemplary punishment taken by Niger on a Souliard of his, for but taking away of a Dunghill Cock, as it is related by Spartianus. Livy having declared how dishonourably the Roman Souliards lived in their Camp at Sucro, when straggling from the Camp by Night, they robbed and pillaged the Countries round about that lived at Peace: Adds this to the Cauze, That all things were done looly and licentiously, without order or military discipline. Another notable place we find in Livy to this purpose, where description is made of Philip's march through the Territories of the Denthelates. These (faith Livy) had been Philip's Associates, but yet the Macedonians preffed by want, wafted their Country as if it had been the frontiers of their Enemies, robbing and pillaging every where as they went, first great Housef and small Villages, afterwards laying waste some Towns, to the no little fame of the King, who from all parts heard his friends and confedrates imploring in vain the Gods and him for redrefs. Feligus we find branded by Tactinius with infamy, for that he did more hurt to his Friends than to his Enemies. And the Vetilian Souliards were notorious throughout all Italy for their luthor and Thievery, and for this caufe were only terrible to those that entertained them. And here I cannot but infer the opinion of some Divine which I conceive to be very right, namely, That the King that pays not his Army, flands obliged not to the Souliards only, but to his Subjects and Neighbours for the injuries they fuftain by them, who without pay cannot live, but by rapine and plunder.

On the other fide, it is the duty of thofe that are not concerned in the War, to do nothing whereby he that fomets an ill caufe may be strengthened, or whereby he that moves in the defence of a good caufe may be hindered, according to what hath been already said: But where the caufe is doubtful, to fwe themfelves equally civil to both parties, whether it be by fuffering them to go through their Country to pafs and repals with their Legions, or by not relieving either, being clofly befieged. The Corcyrenfes in Thurydites tell the Athenians, That it concerned them if they should be thought Neuters, neither to fuffer the Corinthians their Enemies, nor themselves to raise forces in Atkins. For this, the Romans objected againft Philip, that he had doubly violated his League with them; firft, in wrouging their Friends, and again, in affiling their Enemies with Men and Money. The very fame objections T. Quintius makes in his Treaty with Nabis, Thou fayft (faith Quintius) that thou haft not directly violated thy League with us: How often fhall I convince thee that thou haft? I fhall not ufe more arguments, but fhall draw to this issue, By what means thinkeft thou may friendship be broken? certainly by these two chiefly, if thou perfecute our Associates as thine Enemies, or joineth thy felf with our Enemies againft us. Agathias tells us, that he is an Enemy who doth that which pleaseth an Enemy. And Propocius reckons him to be in the Enemies Army, who supplies the Army of an Enemy, with things properly appertaining to War. Queen Elizabeth tells the Hanfetows, complaining that their privileges were broken by her feizing of some hulks carrying warlike provisions into Spain, who had then open War with England, That he right of neutrality is in fuch fort to be used, that whifh we help the one we hurt not the other. And fo on the contrary, as Amalafamba in Her Epitile to fultinian pleads, He is a friend and companion, who though he fand not in a readiness to fight, yet readily and openly supplies us with all things requisite for War. Of the fame opinion was Demofthenes of old, Qui ea fucit aut machinatur quebus ego capa paffim, etiam nec fuiat, nec jacentem emitant, hoftis mihi eft; He that makes or contriveth fuch things whereby I may be taken, though he neither strikes me, nor throws a dart at me, is mine Enemy. E. M. Actius tells the Epitores, who though they fent no supplies of Soullards to Antiocthus, yet were acquifed for supplying them with money, that he knew not whether he fhould rank them among Neuters or Enemies. And L. Armilius the Pretor re- proves the Teji, for that they had viufualled the Enemies Fleet, and promifed them wine; adding withal, that unlefs they did the like for them, they fhould be held as Enemies. We fhall conclude with that of Augustus Caesar recorded by Plutarch, Pacis juis Plut. Brut. amicitia Civitas, quae homo recipit: That City hath lost its right to Peace, that receives and protects an Enemy. It would be very commodious for us therefore, if such a League could be made with both parties engaged in War, that with their confents we might fit still as well withers to both; and yet, that it may be lawful for us to perform the common duties of humanity to either of them. So Livy, Pacem, quod medius decent ani. 

III.
The duty of thofe that are at Peace.

Cand A. An. 1587.

CHAP. xvii.

Of Neuters in War.

533

Liv. 28.

Liv. 40.

Liv. 3.

Livy 35:

Livy 37.

Livy 35.

Livy 35.

Livy 35.

C H A P.
C H A P. XVIII.

Concerning things privately done in a publick War

I. Whether it be lawful to hurt a publick Enemy privately, explained by a distinction.

II. What they may lawfully do against an Enemy by internal justice, that make War at their own private charge (i.e.) as Privateers; first in respect of the Enemy.

II. Secondly in respect of the State or City under whom they fight.

VI. What the Laws of Christian Charity require of them.

V. How a private War may be mixt with a publick.

VI. Unto what he founds obliged, who without order distrains an Enemy, explained with a distinction.

W H A T we have hitherto said doth mostly appertain unto such as have the supreme Authority in an Army, or unto such as are to execute publick commands. Now we are to see what in a publick War may privately be done, whether we respect the Law of Nature, Nations, or the Divine Law. Cicero in the first of his Offices relates, that when Marcus the Son of Cato the Senator, had lifted himself in the Army under Pompeius the General, that Legion in which he served being disbanded; yet he for the delight he took in Arms, continuing still in the Army, Cato wrote to Pompeius, defining him in case his Son would continue there, to give him a second Oath; adding this reason, because the former Oath being with that Legion discharged, it was not lawful otherwise for his Son to fight the Enemy. Whereunto the same Cicero adds the very words of Cato recited out of his Epitile to his Son, wherein he advised him, To take heed how he engaged in Battel, for that it was not lawful for him to kill an Enemy being then no Souldier. So we read in Plutarch of one Chrysantas a Souldier under Gnaeus, who having his Sword lifted up to kill his Enemy, and hearing the Trumpet found a Retreat, withdrew his hand and would not hurt him (as if it were only the necessity of obeying his General, that could justify a Souldier in killing his Enemy, without which it would be no better than Homicide.) Seneca tells us, That such an Officers that neglects the sound of a Retreat. Now they that conceive this to proceed only from the external Right of Nations are mistaken. For if we respect that Right only, it is lawful for any man as to pollute himself of his Enemies Goods (as hath been said) to take away his life also; for by that Right, Hostes pro nullis habentur; Enemies are not reckoned as men. This therefore that Cato advised, proceeds from the Roman Military Discipline, which provided, That he who being a Souldier observed not the word of Command, though the fucceeds were good, should notwithstanding be put to Death (as Modestinus observes;) But he that without order or command should engage in fight with an Enemy, was so understood as if he wilfully disobeyed his Generals command; as we are taught, as well by the severity of Marcus to his own Son, as by the like proceedings of Epaminondas against his. Because in case such things may rashly be done, it may happen that Souldiers may sometimes defert their own stations; which licence encroaching, the whole Army or some part thereof, may happen to be unexpectedly engaged on terms very unequal, which by all means is to be avoided: which is the reason why Acilius Caffus pait the sentence of Death in the like case, Evenire potius ut effet in idide; It might have so happened, faith he, that amhulites had been laid to the deftruction of the Army. And therefore Salus in his description of the Roman Discipline, tells us, That in War, as well they who contrary to command had fought the Enemy, as they who being called back made not their return in time, were frequently punished. A certain Spartan being just about to kill his Enemy whom he had in his Power, hearing the Trumpet found a Retreat, suddenly flaid his hand, giving this reason for it, Prefcitis parre famus est quem hostem occideres; Better it is to obey our Commanders than to kill our Enemy. And Plutarch gives this as the reason, why he that is dismisst the Army, hath no Right to kill an Enemy, because he is not bound by any Military Laws, which they that are to fight the Enemy are obliged to observe. Epictetus in Arrian, reciting the fact before-mentioned of Chrysantas, adds, Tanto illi potius videbat Duci quam fiam voluntatem exequi; That he thought it much better to execute the commands of his Captain than to humour his own passion. But if we respect that Right which is internal and natural, it seems lawful in a just War for any man to do those things wherein the innocent party may receive benefit, so as he exceed not the just measure of making War: not that it is lawful for him to make any thing that he takes from the Enemy his own; for to him there is not any thing owing, unless haply it be in the nature
ture of a punishment, which he exacts by that Right which is common to all mankind, which in what measure it is by the Evangelical Law restrained, may easily be underfooted by what we have said above. Now a command in War may be either General, or Special: General as when in a tumult among the Romans, the Consul cried out, Qui Rempublicam salvam volunt, me sequantur; Let them that with the safety of the Commonwealth follow me. Nay, sometimes this power of killing is granted to every Subject, beyond what is done in our own defence, if it be expedient for the public safety.

A special charge or command to kill an Enemy may be given, not only to them who receive pay, but to those who go to War on their own charge; or (which is yet more) who administer upon their own charge a part of the War, as they that build, set out, and maintain men of War at their own private charge, who instead of pay, gain to themselves whatsoever they can take from the Enemy, as is elsewhere decla-

red: which how far it is agreeable to that which we call internal justice, is worthy dis-

puted. This justice hath respect, either to the Enemy, or to the City, with which we make our Contract. From an Enemy, the possession of all things that may conduce to the maintenance of the War, may for our own security be taken away, but this must be under a condition of restitution; but the Dominion or property in those things must

be no farther retained, than will serve to compensate the costs and damages which that City that maintains the War hath been at, either from the beginning, or in the prosecution of the War; whether the things so taken, belong to the Commonwealth that is at enmity with us, or some private Citizens thereof, though haply of themselves they are innocent: but the goods of such of their Subjects as are nocent, or in actual Arms against us, may be taken and detained by way of just punishment. Things there-

fore taken from the Enemy may be theirs, who at their own charge maintain part of the War in respect of the Enemy, so far forth as to balance their damages and expen-
ses, with some allowance for the peril they undergo, which also ought to be valued

equal Arbitrators.

But as to the City with whom we contract, the same will be internally just, if at least there be an equality in the Contract, that is, in cause the charge and peril we undergo, be but equivalent to the Body we take or may hope to gain. But if the Booty hoped for, do in value surmount the charge and danger, the overplus ought to be restored to the City; just as he that buying at a low prize, the cañ of a Net, which though uncertain, yet is easily made, and yet of great hopes (if it answer his expectation) is bound to give to him with whom he did contract, so much as to make the balance even.

But suppose that what we do thus take, be no more than what in strictness of justice we may keep, yet may we thereby break the bonds of charity, wherein, as Christians we stand obliged; as in cafe it appear, that the Booty fo taken, doth not impoverish the Commonwealth or the King that maintains the War, or those particular persons that are in actual Arms against us; but rather such particular persons as are innocent, who likewise are thereby reduced into so miserable a condition, that in case we should cast those who are privately indebted unto us into the like, we should be thought unmercifully cruel. Whereunto if we likewise add, that the spoil we take from these, contributes little or nothing, either to the finishing of the War, or to the enfeebling of the Enemies strength, it will easily convince us that it would ill become an honest man, much less a Christian, to make an advantage to himself from the folc infecility of the times. For which very thing it was that Plutarch fo: "ignly blamed Caius, saying, Plurique homin ex igne belloque rapitus, nihil magis intru habens quam communes calamitates; The greatest part of whose riches he gained by Fire and by War, raising his private fortunes by nothing more than by publick calamity.

But it sometimes happens, that by the occasion of a publick War there ariseth a pri-

vate; as if a Man fall by accident amongst his Enemies, and is thereby in danger of his life or Goods, in which case, such means as we have already granted, may lawfully be used in defence of our lives and fortunes. We read that sometimes in War, private profit is warranted by publick Authority; as when a man having fulfilled some extraordinary damage by the Enemy, obtains of his Prince a Commiission to repair his losses by what he can get from the Enemy, which also is to be limited in the same manner, as pledges, and such like things are that are left in gage.

But if the same Souldier or others, shall in a just War set fire to an Enemies House, or deftroy his Fields, or commit such and such like Acts, whereby the Enemy is dam-


ished without special order or command from his Superiors, whereunto we must add, unless it be in case of nccessity, or for some other just cause, That man according to the opinion of our best Divines, stands obliged to make satisfaction. I have here added what they have omitted, unless it be for some other just cause; because if there be any such cause, he may haply be bound to answer for it to his own Prince or State, whole
Of things privately done in a Just War.  

BOOK III.

whose Laws he hath transgressed, but not to his Enemy, to whom he hath done no wrong. Not much unlike was that Answer which a certain Carthaginian made to the Romans, who demanded, That Hannibal should be delivered to them: We, faith he, are not to dispute with you, Whether Saguntum were besieged by the private command of Hannibal, or by the public Decree of the Carthaginian Senate; but whether it were justly or unjustly done, for it belongs unto us only to call him to an account, being our Subject, whether he did it by his own Authority, or by ours. This only concerns you to enquire, Whether it was lawful to be done by that League which we have made with you.

C H A P. XIX.

Concerning Faith to be kept between Enemies.

1. That faith is to be kept with all sorts of Enemies.

II. The Opinion, That faith is not to be kept with Thieves and Tyrants, refused.

III. This Argument, That such deserve punishment, answer'd; being not considerable when we treat with them as such.

IV. Nor will it avail to urge, That the promise was extorted through fear, if he that made the promise was not himself affrighted;

V. Or if the promise were confirmed by Oath, though with men such a violation is not punishable.

VI. This fitted to rebellious Subjects in Armes.

VII. A notable difficulty handled, concerning promises made to Subjects in respect of the Sovereigne Power. Where it is shewed,

VIII. That such promises may be confirmed by the Oath of the City:

IX. Or it may be made to a third Person on the behalf of such Subjects.

X. How the Government of a State may be changed.

XI. That by the Law of Nations the exceptions of fear appertain not to a solemn War:

XII. This to be understood of such a fear as is acknowledged by the Law of Nations.

XIII. That faith is to be kept, even with such as are perfidious:

XIV. But not if the Conditions are not fulfilled; Or if either Party refuse to stand to any part of the Agreement:

XV. Nor if the thing promised be counterbalanced by a just Debt:

XVI. Though that Debt be due upon another account;

XVII. Nor if the Promise be otherwise damned to the like value:

XVIII. Or if the value of the thing promised be due by way of punishment.

XIX. How these take place in War.

We have already shewed, What and how much may lawfully be done in War, simply and in it self considered. We are now to consider what and how much may be done, as consider'd in relation to some foregoing promisfe, namely, Concerning the faith which Enemies ought to keep one with another. It was notably said by Silius, an Italian Poet, concerning a Roman Consul:

Optimus ille
Militia, cui postremum primiumque sueri
Inter Bella sidiem.

He amongst Generals the best praise deserves,
Who first and last in Wars his faith preserves.

Xenophon in his Oration concerning Agesilaus, from his Example concludes thus, So great and excellent a thing it is for every man, but especially Generals, to be just, and to be so accounted in the performance of their Oaths and Promises. So Aristides, in the preservation of Peace and of all other publick Agreements, they are ever most to be regarded that are most just. There is no man, as Cicero well observes, but approves of and commends that affection of mind by which no profit is sought after, but rather faith is preferred against profit. It is the publick faith only, as Quintilian the Father rightly observes, that makes Truces even among armed Troops, and that conserves the Right of surrendered Cities. Faith, faith the fame Quintilian, is the strongest and most indissoluble Bond of humane Society. Sacra laus sibi inter Holtes, Its reputation is great, even amongst Enemies. Fides sanctissimum humani pectoris bonum; Faith, faith Seneca, is the most precious Ornament of the rational soul, the best gift that God bestows upon Men, the strongest support of humane Society. It is the Cement that binds
Of Faith towards Enemies.

The Romans placed her in their Capitol next to Jupiter himself; and deservedly, for a great cause of their prosperity may be attributed to their faith, which they religiously kept both with their Friends and Enemies. Though all other Laws sleep in War, yet must Faith and Justice be strictly observed, faith Ambrose. Of the same mind was St. Augustine, Fides quando promissura etiam postea nullis, contra quem Bendum geritur; When our word is past, it must be kept, though with an Enemy, against whom we wage War. Fidem juravit, dexteras dedixit, qua etiam inter Hostes talent; To have sworn with us, faith Archelius the Philosopher in Appian, I have plighted unto as your Faith, all which are in force even amongst Enemies.

For in being Enemies they care not to be rational men, but by being men endowed with reason they are capable of a Right by virtue of a promise. Camillus in Livy profelletis, That there was between him and the Falis a such a Society as was common with all Mankind; but even from this common Society of discourse and reason, there naturally ariseth that obligation from a promise, whereof we now speake.

Neither we must think that because (as many Authors hold) it is lawful, or at least blameles, to deceive an Enemy by falsehood, therefore by a parity of reason the same may be done, though we have given our faith.

For the obligation of speaking truth proceeds from a cause long preceding any War, and which may haply be in some measure relaxed by War; but a promise doth of it self confer a new Right: which difference was clearly discerned by Aristotle, who treating of veracity thus dilunguitheth, I speak not of him who speaketh truth in ordinary Contrasts and Agreements, and in those which appertain unto Justice and Injustice; which are indeed Branches of another Virtue. Pasianus, speaking of Philip of Macedon, gives of him this Character, No man, faith he, can well fyle him a good Emperor, as being (indeed) always regardless of his Oaths, though made by the Immortal Gods, and upon every flight advantage faithlesly in his promises; so that, though a King, no man was left to be believed, either upon his Word or Oath, than himself. The like testimony doth Valerius Maximus give of Hannibal, namely, That as profess an Enemy as he was to the people of Rome and all the Italians, yet was he a much greater Enemy to faith and sincerity, rejoicing always in falhood and lies, as if they had been commendable Virtues; whereby it came to pass, That whereas he had otherwise beenaccustomed into the World as honourable memory of himself, he hereby left it disputable, Whether his Vices did not exceed his Virtues. Thus the Trojans in Homer, being pricked d in conscience by reasong of their perfidiousnes, condemn themselves:

---rumpentes Federae sacra,
Juramentque fidem, pugnamus; non quibus fas est.

Breaking our sacred Leagues, and Faith, though sworn, We fight against those who thus falle Dealinges foron.

Neither, as we have already said *, may we admit of that of Cicero, Qua non nobis Societas cum Tyrannis, That no Society is to be held with Tyrants. No, nor of the same Cicero, Pirata non est perfidium numero, cum hoc nec fides esset debet, nec jusjurandum commune; A Pyrate is not to be reckoned at any mass particular Enemy, with whom neither faith nor common Oath is to be kept. Nor that of Seneca, who speaking of a Tyrant, faith t, All Obligations to him are cancelled, if he cut off from that which is the common Right of all Mankind. From which impure Fountain proceeded such error of Michael Ephesius *, who taught, That it was not Adultery that was committed with the Wife of a Tyrant. Non putas Adulterium

Xorem Tyrannum polluere; fact nec bomicidium, Tyrannum occasit: Supposing it, faith Seneca t, no Adultery to pollute the Wife of a Tyrant, nor Murder to kill him. Thus Julius Cursus * conceived that a Woman who laid out-lawed might be laine withal, without being punished as an Adulterer. And thus did some of the Jewish Doctors maintain the like error concerning Strangers *, whose Marriages they reckoned as none at all. But Pompey finilished a great part of that Naval War which he made against Pyrates, by conveanted to preferre their lives, and to affign them a Country wherein they might live without rapine.

And of Didius we read, That he was condemned as perfidious, for breaking faith with the Celts, who lived by robbery. Caefer also in the third of his Civil Wars, writes of a composition made by the Roman Captains, with the Tories and Renegades, who lay lurking in the Pirenæan Mountains. Now who can say, That such a composition being z z z made
made is not binding? *Tis true indeed that such Agreements do not produce to friendly a
Communion, as that which the Law of Nations hath introduced between Enemies engaged
in a Solemn and just War: But yet, being men, it may induce such a Communion as natural
Right affords them; as Porphyry rightly argues, which is sufficient to prove that such Con-
tracts are to be performed. Thus did Lucullus keep his faith given to Apollonius, who was
Captain of the Renegadoes; as Diodorus records. And thus did Augustus pay the ran-
some imposed on him by Creatus the Thief, being by him apprehended, rather than he
would satisfy his word; as Dio lexicifies.

But let us now see what more probable Argument than those brought by Cicero may be
produced. The first whereof is this, That such as are notoriously wicked, and are no part of
a Civil Society, may by the Law of Nature be by any man punished, as we have else-
where shewed. But they that may lawfully be punished, even with death, may also be
lawfully dishonour'd of their Goods, and dispossessed of their other Rights; as the same Cicero
well observes, Non est contra Naturam spolium esse sibi posti, quem homini est necare; It is
no violation of the Law of Nature to effect him of his Goods if we can, when it is lawful to kill.
But among such things wherein he claims a Right, even those which accrew unto him by
virtue of any promise that is made to him, may be included; and therefore even those,
by way of punishment, may lawfully be taken from him. Whereunto I answer, That all
this may be very true, if we did not knowingly treat with him as such: But in case we
fight with a Thief, as such, we are fo to be underfood as if we were contented to remit
the punishment due, as to that offence; because, as we have elsewhere said, promises are al-
ways to be taken in such a sense, as that we make not the act void. Thus the old Pimp in
Terence,

Lesa fim, fater, Permissae communis Adolescentum; Perjurus, PeYs; tamen tibi a me nulla est orta injuria.

A Bawd I am; Youth's Common Felt, 'tis known;
Perjur'd; yet wrong by me Thou haft had none.

It was no ill Plea then that Nabis (in Livy) made, when his tyranny was objected against
him by Quintus Flaminius, Concerning the name Tyrant, I answer, That whatsoever I am, I
am the very same I was when thou, O Titus Quintius, entred in League with me. And by
and by, Those things, whatsoever they are, I did when ye contrasted friendship with me.
Whereunto he presently adds, Si quid ego non stiam, mibi inconstantiae mea; cam vos mutatis,
vos vis vestra ratio reddenda est; If I had changed, I ought to have given the reason of my in-
consistency; but seeing it is you that change, you ought to give the reason of yours. Not much unlike
unto this is the Answer that Pericles in Thucydides gives unto his Subjects, Our Confederates
we shall permit to enjoy their own freedom, and to live by their own Law, if they did so when
they first entred into League with us.

Another Objection may be made, which I have heretofore hinted *, namely, That he
that by fear hath extorted a promise, ought in Justice to release the Promiser; as having
by his influence damm'd him, that is, by such an act as is repugnant both to the nature of
human Liberty, and to the nature of the act it self; for all promises that bind ought to be
free. This, though in some cases true yet, is not to be extended to all promises that are
made to Thieves; for that the Promiser be bound to free the Promiser, it is requisite
that he to whom the promise was made should have extorted the promise by an unjust fear:
But in case a man shall come and promise to pay the ransom of his Friend, and thereby
deliver him out of Bondage, he is bound to perform it; because there was no impression
of fear upon this man, who in the behalf of his Friend came voluntarily to make this
Contract.

Whereunto we may add, That he that is compelled, even by an unjust fear, to make a
promise, may be obliged to perform it, if he confirm that promise with an Oath; for thereby
(as we have shewed before) he binds bound, not unto men only, but unto God, again
whom no exceptions can be admitted. But true it is notwithstanding, That by
such a sole promise, though confirmed by Oath, the Heir of the Promiser stands not obli-
ged; for those things that descend to the Heir, which by the original Right of Domin-
ion may pass from man to man in ordinary Traffic. But those things that are due unto
God, cannot, as such, be included amongst such. Moreover, here we must again re-
peat what we before delivered, That if a man do haply break his faith with a Thief, when-
ther sworn or unsworn, he shall thereby incur no punishment amongst other Nations: For
generally all Nations, in detestation of these men, whom they account as common en-
emies to humane Society, are pleased to connive at whatsoever is (though unjustly) done a-
gainst them.

But
But what shall we say concerning the War that Subjects make against their King, or against such as have the Supreme Authority? Though they may haply have a cause not in itself altogether unjust, yet that they can have no Right to act by force against their Prince, we have elsewhere shewed. But yet it sometimes so happens, that either their Cause is so notoriously unjust, or their obstinacy in refraining so great, that it may be severely punished. But yet, if they be treated with as Rebels or Traitors, and therein any promise made unto them, the punishment though justly due for their Treason ought not to be pleaded in Bar to the performance of that promise. For such was the piety of the Ancients, that they durst not break their faith, no not with their very Slaves; as may appear by the Lacedemonians, who were generally believed to have been justly punished for putting their Tenentaren Prisoners to death, contrary to their Covenants. And it is likewise observed by Diocedes, That the faith given to Slaves in the Temple of the Palæis was never broken by any of their Lords. Neither will any exceptions of fear be allowed of in this Cafe, if the faith given by Oath confirmed: as we may collect from M. Pompeius, the Tribune of the People, who being bound by Oath, punctually performed what he had, though compelled by fear, promised to L. Mamilius.

But a greater difficulty than any before mentioned may arise from the Legislative Power, and from that supererogant Right of Dominion which every City hath over the things of their Citizens, and which is exercised in its name by him that hath the Supreme Power therein: Which supererogant Right, if it extend it self to all that is the Subjects, why should it not likewise unto that Right which arises from any promise made in War? Which being granted, then it should seem that all such Promises and Agreements may be null'd, and so all hopes of concluding a War, unless by Victory, would be lost. But on the contrary, we must observe, That this supererogant Right is not fit to be put in execution promiscuously, at all times; but so far forth as it is commonly expedient to the preservation of the publick safety in a Government not Tyrannical, but Civil, yea even Regal. But for the most part it is commonly expedient, That all such Promises and Agreements should be fulfilled. Very apt also to this purpose is that which we have already written concerning the defence of the present Government; adding thereunto, That where the publick safety requires that this Sovereign Right should be made use of, satisfaction ought to be given out of the publick to such particular persons as shall be thereby damned, as shall be hereafter more fully explained.

Moreover, Agreements may be confirmed by Oath, and that not by the King or Senate alone, but by the whole Body Politick; as Lycurgus bound the Lacedemonians, and Solon the Athenians, by Oath to observe the Laws they had given them. And left the change of Citizens should in time relax the binding power of this Oath, (and so at length it be forgotten, or left arbitrary) this Oath may be every Year renewed; which if done, the Citizens could by no means recede from their Engagements, no though it were for their publick profit. For a City hath power to grant away even what is her own. Now the words of the Oath may be so clear and so full as not to admit of any exceptions, Lege Lexem, qua te jurando ab officio liberaurus; Read over your own Law, with Valerius Maximus to the City of Athens, whereunto he bound by your Oath. And such Laws the Romans held as sacred, because the people of Rome were obliged by Oath to keep them, as Cicero tells us. We find in Livy a very pertinent Discourse as to this matter, though of it self more obscure, where (as the opinion of the best Expositors of the Laws) he afferts, That the Tribunes of the people were sacrae sanitatis, that is, so holy, that they could not be injured without perjury. But for we neither the Aediles, Judges, nor Decons; and yet to injure either of these was punishable by the Laws. The ground of which difference was this, Because these latter were thought sufficiently defended by the Verticity of the Laws alone. But that which was in the last place enacted by the people was most inviolable, yet whilst the Law remained in force, no man could pretend to a Right to act contrary to the Laws. But that which defended the Tribunes, besides the Law, was the publick Religion of the Romans, for they were bound by a solemn Oath not to offer violence unto them, which they that took, could not break without giving a publick scandal to their Religion. This light we receive from a place in Dionysius Halicarnassensis, where it is thus recorded, Brutus calling the Assembly together, proposed it to the People of Rome, That the Tribunes of the People might therefor be rendered inviolable, not by the Laws only, but by a publick Oath, whereunto all the People gave consent. And hence it was that this Law was called sacrae. And therefore that fact of Tiberius Gracchus in deposing Octavius from the Tribunehip, (alluding that the Tribunitial Power had its sanctity from the people, but not to be exercised against them) was much condemned by all honeft men. And therefore, as I have said, as well a City as a King may be bound up by Oath in such Agreements as they make with their own Citizens or Subjects.
X.
How the publick State may be changed.

But yet farther, A Promise or Agreement made by Princes or States to their own Subjects shall be valid, being made to a third person, who hath given no cause of fear. But wherein and how far forth that third person may stand interelled in that promife, being one of the niceties of the Roman Law, we shall not here search into. For naturally it concerned all men to provide (as much as in them lies) for the safety of others. Thus we read, That King Philip having made his Peace with the Romans, bound himself by promife, Not to revenge himself on those Fugitives, who during the War had sided with the Romans.

But yet possible it is, as we have elsewhere proved, that a State may sometimes become mixt; and as from an Absolute Monarchy it may pass into an Absolute A+riffocracy or Democracy, fo also it may by Covenants and Agreements be transferred from any one of these simple, into one mixt, of any two, or of all. So as they which before were Subjects, may begin to settle the Government in themselves, or at least some part thereof, even with a liberty to defend and protect their own Party by Force of Armes.

Whereas that fear is said here to be just which is caused in a Solemn War, it is to be understood of such a fear as the Law of Nations doth not disallow: As for example, A promise wrung from an Ambafador that is taken Prisoner, shall not yield the least advantage to him that extorts it; as Mariana testifieth. So in case any thing be extorted through the fear of Ravishment, or through any other the like terror or affliction, contrary to our faith given; this ought to be judged by the Law of Nature, because the Law of Nations takes no cognizance of any such fear. Again,

That faith ought to be kept with such as are notoriously pernicious, we have in a more general Treatife already proved: Which also we may learn from St. Ambrofe, which without doubt reacheth even unto such enemies as are altogether faithles. Such as the Carthaginians were unto the Romans, who notwithstanding kept their faith inviolably with them. For, as Valerius Maximus well oberves, The Roman Senate regarded not what the Carthaginians deserved, but what in honour became the People of Rome; which is the Testimony that Salus gives of them, In all the Wars, faith be, between Rome and Carthage, though the Carthaginians, at well in times of Peace as during their Truces, committed many outrages, yet would not the Romans upon any provocation permit that the like should be done unto them. And concerning that fact of Sergius Gala, who, in revenge upon the Portuguese for so often breaking their League with him, first deceived them with a new League, and then flew eight thousand of them; Appian gives this Anfver, Perfidia perfidiam uitur, contra Romanos Dignitatem, Barbaros imitatur; In revenging one treachery with another, he wounded the Majesty of the people of Rome, imitating therein the Barbarians. For which he was afterwards worthily accußed by Labo, a Tribune of the People, whereof Valerius Maximus gives his opinion thus, It was not equity, but compaffion, that pleaded in that Cause: For that abfolution which his own innocency could not challenge, was given to his innocent Babes: which also is confirmed by Cato, He had certainly died for his treachery, had not his own tears, and the innocency of his Children, procured his pardon.

But
But this also we may observe, That there are two ways whereby a man, though he perform not what he promised, yet may avoid perdictions, as namely, If the Condition be not performed whereupon that promise was grounded, or if some other compensation be made for it; for want of the Condition the Promiser is not really discharged: but it will appear by the event, That there had been no obligation but what was contracted upon Condition; therefore that Condition being not performed, there needed no discharge. Whereunto we may refer another Case, namely, If the other do not perform that which he was first bound on his part to fulfil. For the particular Heads of one and the same Agreement seem to be complicated each with other in the manner of a Condition, as it had been thus express. Thus will I do, if you do for or fo, which he hath promised. Wherefore Tullius in his Anwer to the Albanis, calls the Gods to witness, Whether of the two Nations were the first Aggressor? praying earnestly, That all the miseries of the War might befall that Nation. For as Ulpian notes, He breaks not the League, who therefore renounces his Associates, because they do not perform some Articles, whereas the League was at the first made. For which Caufe, where it is otherwise intended, it is usually thus express, That if either Party shall transgress in this or that Article, yet shall the rest remain firm and inviolable.

The original of compensation or remembrance we have elsewhere declared, * namely, When we cannot otherwise recover either what is our own, or what is justly owing unto us, we may take away from him that either detains it or owes it the full value, thereof in any thing else, whence it follows, That whatsoever is in our possession, whether it be Corporeal or Incorporeal, we may much more lawfully detain and keep. Whatever therefore it is that we have promised, it is in our power not to perform; if it be of no greater value than that which being once ours, he to whom the promise was made injuriously keeps from us. Comparatio non inviolata est, ubi aut Gratia aut Injuria communis est ratio; That comparison is to no man odious, wherein a common regard is had to either courtey or injury. Thus in a wager at Law, faith Seneca, the Debtor doth sometimes cast the Creditor, when he hath upon some other account got more from him than his Debt a mounted unto. For between the Creditor and the Debtor only the Judge sits as an equal Arbitrator, who may say to the Creditor, It was the money that thou lentest, how camest thou then by the Land which thou possessest, but never borrowed? wherefore upon a just valuation, Thou that camest in a Creditor, Depart hence a Debtor.

The Cafe is the same if he with whom we have to do owes me as much upon any other Contrary, which I cannot otherwise recover but by detaining that which I have promised to him. In Courts of Justice there are, faith Seneca, * some separate Actions, neither is the form confounded. But those Precedents, as it is there said, are contained within certain Laws, which are necessarily to be followed. One Law is not mixed with another. We must walk as every Law doth lead us. But the Laws of Nations admits of no such distinctions, namely, Where there is no other hopes of recovering what is our own.

The like may be said where he that exacts a promise hath damned the Promiser to the value of the thing promised. Thus the same Seneca, * The Farmer is not bound to his Landlord, though his Lease be not cancelled, in case he wilfully trample down his Corn, and cut down his Fruit-trees; nor because he hath received what he agreed for, but because he hath hindered his Tenant from receiving the Fruits of his Grounds, whereby he should have paid his Rent. Where also he subjoins another Example, Fucus abegiis, Servum occultii; Thou hast haply driven away his Catel, or slain his Servant. And a little after, It is lawful for me to compare the good that any man doth me, with the hurt that he doth me; and thereby to pronounce my self his Debtor, or him mine.

Lastly, Whatsoever also is due to the Promiser by way of punishment, may be emballanced with what he hath promised; which Seneca in the same place thus clearly illustrates, Beneficio Gratia debetur, injuria ultia; Thanks is due for a courtey, revenge for an injury? If therefore I pay him no thanks, nor require that punishment from him that I lawfully might; there is nothing at all due to either, for the one acquires the other. And anon, By comparing the good turns I receive with the wrongs I receive, I shall easily discern whether I am indebted unto him, or he to me.

But as whatsoever is contended for by a wager at Law cannot whilst the Suit depends be counterballanced against that which is promised, whether it be the thing sued for, or the costs and damages sustained in the Suit; so neither can the injuries that first occasioned the War, nor any of the losses or expences which are usually through the licence in War caused, be recompenes as long as the War lasts. For the very nature of this business, left nothing at all be done, shews that setting a part on either side the controversies of the War, they are agreed. For otherwise there can be no Agreement so firmly made, that may not be avoided. Whereunto may that of Seneca not unfitly be applied, Our Ancestors would admit of no excuses.
Of Faith to be kept with Enemies.

BOOK III.

...at all for the breach of promises, that so they might teach us that our faith was altogether to be kept: For better it was not to admit of some excuses, though just, from a few, than to encourage all to make what excuses they would for the breach of their faith. But what things are those which may countervail that which is promised? Surely in the first place, whatever by any other Contract made since the War is owing unto us by him to whom our promise was made, or whatsoever damages we have sustained by him in the times of Truces, or in case the Persons or Rights of Ambassadors have been by him violated, or, in brief, if he have done any other thing which between Enemies is not justifiable by the Law of Nations, where this also is to be understood, that the satisfaction be made between the same persons, and that the Right of no third person be thereby injured; but yet with this allowance, That the Goods of Citizens may stand obliged for the Debts of their own City, as those of Subjects may for the Debt of their Prince; as we have already shewed. Whereunto we may add, That it is the sign of a generous Soul strictly to observe his faith in Leagues given, notwithstanding all provocations to the contrary by injuries received: Upon which account it was that that wise Indian Juncebas so highly commended that King, who being much injured by his Confederates, yet would never break his faith given, saying, Tain sancte se jurasse, ut alteri ne post acceptam injuriam nociturus esset; That the Oath he had taken was so sacred, that he durst not injure him to whom he had given his faith, though he were sufficiently provoked. Now look what other Questions usually arise concerning our faith given to Enemies, may almost all of them be resolved by applying them to those Rules hertofofore prescribed, concerning the Obligatory Power, as of Promises in general, so of those special promises made by Oaths, Leagues, Sponsors, and of the Right and Obligation of Kings, and concerning the interpretation of such promises as are ambiguous. But yet notwithstanding for the better use of what hath been already said, and for the clearing of any other doubts which may happen to arise, it shall not at all be troublesome to me briefly to unfold such of these special Cases as are most notable, and as do most frequently occur.

CHAP.
Concerning the publick Faith, Treaties, Lots, set Combats; Arbitrements, Surrenders, Hostages, Pledges.

I. The division of Faith among Enemies in order to that which follows.

II. In Monarchies, it is in the King's power to make Peace.

III. What if the King be an Infant, Mad, a Prisoner, or an Exile.

IV. In other Governments this power is in the major part.

V. How an Empire, or a part of it, or the goods of a Kingdom, may be firmly alienated to obtain Peace.

VI. How far by a Peace made with a King, his People and Successors may stand bound.

VII. That what is the Subjects, may in Peace be granted away for the publick good, but with condition of repairing damages.

VIII. What may be paid of things already left by War.

IX. No distinction here between things got by the Civil Law, and things got by the Law of Nations.

X. With Foreigners, what a King doth, is held to be for the publick good.

XI. A general rule whereby to interpret Articles of Peace.

XII. In doubtful cases it is credible, that it is agreed, that things should remain in the State they are at present; how this is to be understood.

XIII. What if it be agreed, that all things shall be restored to the condition they were in before the War began.

XIV. Then they who being before free, and had voluntarily enforced themselves, were not to be made free.

XV. That damages occasioned in War, if left dubious, are presumed to be forgiven.

XVI. But not theft, which before the War were due to private men.

XVII. Punishments also before the War publicly due, if left doubtful, are believed to be remitted.

XVIII. What is to be said concerning the Right that private men have to require punishment.

XIX. That Right which before the War, though publicly claimed, was controverted, is easily believed to be forgiven.

XX. Things taken after Peace made, to be restored.

XXI. Of agreements, whereby things taken in War are to be restored; some certain rules.

XXII. Together with the things, the fruits and profits are to be restored.

XXIII. Concerning the names of Countries.

XXIV. Concerning the relation that it had to some precedent agreements.

XXV. Of delay.

XXVI. Where the words are doubtful, the interpretation must be made against him that gives Laws.

XXVII. Definition must be made between the giving of a new cause of War, and the breaking of Peace.

XXVIII. How a Peace may be broke, by doing contrary to that which is presumed to be in every Peace.

XXIX. What if we be invaded by Associates.

XXX. What if by Subjects? and how their facts may be judged as approved.

XXXI. What if Subjects engage under another Prince.

XXXII. What if Subjects be invaded? explained by distinction.

XXXIII. What if Associates? who are likewise distinguished.

XXXIV. How a Peace may be broken by doing contrary to that which was laid in the Peace.

XXXV. Whether any distinction is to be made between the Articles of Peace.

XXXVI. What if to the breach of the Articles there be some punishments added.

XXXVII. What if we are hindered by unavoidable necessity.

XXXVIII. The Peace shall stand firm, if he that is injured be willing thereunto.

XXXIX. How a Peace may be broken, by doing that which is contrary to the special nature of every Peace.

XL. What under the name of friendship may be comprehended.

XLI. Whether it be enough to break friendship, to receive Subjects and Exiles.

XLII. How War may be ended by loss.

XLIII. How by a set combats, and whether lawful.

XLIV. Whether the fault of the King doth impose this case oblige the People.

XLV. Who is to be judged the Conqueror.

XLVI. How War may be ended by Arbitrements, and how it must be understood, if it admits of no appeal.

XLVII. Arbitrators in cases doubtful, must be so understood as bound to do Right.

XLVIII. That Arbitrators are not to determine of possessions.

XLIX. How far the force of a pare declarit extend.

L. What a Conqueror ought to do as to such as surrender.

LI. Of a surrender upon conditions.

LII. Who may and ought to be given in Hostage.

LIII. What Right is given against Hostages.

LIV. Whether an Hostage may awfully escape
Of the publick Faith whereby War is concluded. BOOK III.

I.
The Division of Faith in order to what follows.

LV. Whether an Hostage may be lawfully detained upon any other account.

LVII. The King dying who sent the Hostage, whether the Hostage may lawfully be detained.

LVIII. Hostages may sometimes be principally obliged, and that one of them is not bound for the fault of another.

LVII. What obligation lies upon pledges.

LVII. When the Right of redemption of things engaged, is to be judged as lost.

II.
The power to make Peace is in the King if the Government.

* See Bo. 2. ch. 15. § 3.

1. What if the King be an Infant.

* Bo. i. ch. § 24.

Friends King of France (being Prisoner to Charles the Fifth Emperor and King of Spain) his cafe about the Duchy of Burgundy. See Lord Herberts Hift. of H. the 82 pag. 193.

III.

What follows.

IV.

What if the King be an Infant.

* Bo. 2. ch. § 5.

17. * Lib. 32.

What is it in his power to make Peace? yea surely, if it appear that he lives free, obnoxious to none; for otherwife the condition of an exiled King is not much different from that of another Captive, a banished man being but a Prisoner at large. Thus Cicero speaks concerning Regulus, that he refus'd to give his opinion in the Senate, alleging, that fo long as he froid bound to his Enemies by Oath, he was uncapable of voting as a Senator.

But where the Supreme Authority is feared, either in the Nobles or in the People, it is in the power of the major part of them to make Peace: The Decrees either of the publick Senate in the former, or of the Citizens in the latter, being to be pronounced by such as by use and custom have a Right thereunto, according to what we have elsewhere delivered. And therefore what is thus agreed upon shall oblige the whole, yea, even those that difented from them. Thus Legy*, Whichever is once upon a full debate decreed, is to be defended by all, even by those who had been before against it. Wherewith accords that of Dionysius Halicarnassensis, Parendam efli his qua parte major decreverit; Whatever the major part thinks fit, must by all be obeyed. So likewise Appius, Onnes decreto obsoletus etemorum, nulla admisit excommunication; What is so decreed is by all men to be observed, no excuse being admitted of to the contrary. With whom agrees Pliny, Quod pluribus planius, cumius tenendum; What pleafeth the greater part obligeth all: But those whom Peace obligeth, it also profetebat; Iadem & volentibus prodeth.

Now let us fee what manner of things they are that are subject to fuch agreements; most Kings now a days, because they hold not their whole Kingdoms, nor any part of them in propriety, but in refpeft of their fruits and profits only, cannot by any Contract or Agreement alienate them *. Yea, and before they receive that great charge of the Empire upon them (during which time the People are as yet above them) all fuch acts of alienating the Kingdom or any part thereof, may by a publick Law for the future be made absolutely void, fo that as to what concerns That, they shall not be binding
binding at all. And credible it is that the People were generally thus minded, Xe alia-
qui f ad id quad intereffit salus effe actio contractiense, subsequitorum bona pa deboi regis caperetur; Left otherwise as to that which is so provided against the action should hold good to the per-
son contracting, the goods of the Subjects might be taken for the Debt of the King: And con-
sequently this caution of not alienating the Kingdom would be in vain. But that the
whole Empire may be firmly alienated, the whole body of the People must yield their
confents, which may quickly be done by their Represenatives, which are the three Or-
ders or States of a Commonwealth; namely the Clergy, Peers, and the Commons:
But that any part of the Empire may be firmly alienated, a twofold consent is requi-
site; first of the whole, but more especially of that power which is to be alienated,
which cannot be severed from the body whereunto it grew against its will. This was
the French Kings Plea why he would not deliver Burgundy as he had upon his Oath a-
greed and promised. But yet in a case of extreme necessity, and otherwise unavoidable,
That very part may firmly convey away the Government over themselves unto any
other without the consent of the People; because credible it is, that when that so-
ciety was instituted, this power was reserved. But in Kingdoms that are Patrimonial,
what should hinder a King from alienating his Kingdom I know not; but yet such the
cafe may be, that such a King hath no power to alienate any part thereof, as if he
received the whole as his propriety upon this condition that he should not divide it.
But as concerning those things which are called the goods of the Kingdom, these may
also become the Kings Patrimony two ways, either as separable from the Kingdom, or
as inseparably united unto it: if this latter way, they may be transferred, but not un-
les with the Kingdom; if the former, they may be alienated without it. But such
Kings, whose Kingdoms are not patrimonial, can hardly be permitted to alienate the
Goods of the Kingdom, unless it evidently appear by some Primitive Law, or by a
continued and uninterrupted course that they may do it.

But how far the promise of a King shall bind his Subjects and Successors, hath
already been declared *, namely, so far as the power obligatory is comprehended in that
Government, which should be neither infinite nor impaired within in too narrow bounds,
but to extend so far only as in probable reason it shall be found convenient. But in
case the King be absolute Lord * over his People, as having at his own charge con-
quered him, and so holds them under a Government merely Dejpotical and not Civil;
or if he have gained the Dominion, not over their persons but over their things, as
PharaoS bought all that the Egyptians had, for Corn; or as they that admitted of Stran-
gers into their Houles, to whom they prescribe what Laws they please: if I say, the
Government be thus absolute, then it is another thing. For in this cafe, besides that
Right which is regal, there is an acces of another Right which makes that jufifiable,
which a bare regal power could not.

But here there usually arises another Quefion, namely, What Right Kingdoms have
over the Estates of private men in order to the establishing of Peace, as having no other
Right to that which particularly belongs to his Subjects, than what he hath as a King.
That the things belonging to Subjects are under the supreemest power of the Com-
monwealth, whereof they are a part we have already proved, so that that Commonwealth,
or he that exercises the supreme power in it, hath a Right to make use thereof,
both of either by even defroying them, or by alienating them, and that not only in a cafe
of extreme necessity, which is even between private men jufifiable; but when it ex-
tends even to the good of the publick, which is always to be preferred before any pri-
ate mens, by the general consent of those who first entred into civil society. Which not-
withstanding is fo to be understood, that the whole Commonwealth is obliged to repair
the damages, that shall befall any of her Subjects or Citizens, by reason of any such
spoil or alienation, out of their publick stock, or by a publick contribution; whereunto
even he who hath defrauded the loss, shall (if need be) pay his proportion. Neither shall
That city or Commonwealth stand discharged from this obligation, although at present
it be not able to satisfy it; for whensoever that City shall be enabled, this leeping ob-
ligation may rise up against it.

Neither can I here generally admit of the opinion of Vlfagius, namely, that the City
is not obliged to repair the damages of her Citizens sustained by the War, because
such damages are by the licence of War permitted. For this Right of War hath only
respect to the People of several Nations as we have elsewhere explained it *, and part-
tly to such as were in open hostility amongst themselves, but not to Citizens amongst
themselves, who being mutually associated, and equally engaged in the defence of their
City, should in equity effect every mans to be the common loss. But yet doubtless, it
may by the Civil Law be so ordained, that no Action shall lie against such a City for
any damages sustained by the War, to the end that every man may be the more
watchful and resolute to defend his own.

See Bo. 2. ch. 15.

VI.
How far the people and
Successors are obliged by a
Peace made by the
King.

* See Bo. 2. ch.
3. 9. 10, 11.
* See Bo. 3.ch.
8. 9. 2.

VII.
What power a
King hath over
his Subjects
Goods of
the
Peace.

* Bo. 3. ch. 6.
§ 2.

VIII.
But what if the
things be al-
ready lost by
War.

Some
IX.

Some there are that place a vast difference between those things which belong to Subjects acco ding to the Law of Nations, and those things which are theirs by the Civil Law, granting a larger Right to the King in taking away theft, without either caufe or recompence; but not so in the former, but erroneously. For a Right of Dominion, however lawfully gained, hath always by the Law of Nature its proper effects; that is to say, that it cannot be taken away, unless it be for such caufes as are naturally inherent in Dominion it self, or such as arise from some fact done by him that is the right owner.

X.

Now this care and inspection that the things of private persons be not alienated, unless it be for a public benefit, appertains to the King and to the Subjects, as that of repairing of damages doth to the City, and each particular Citizen. For the bare fact of the King, is sufficient to Strangers that contract with him, not only in respect of the preface which the Dignity of his person brings with it; but also in respect of the Law of Nations, which permits the Goods of Subjects to stand obliged by the fact of the King.

XI.

But as to the right understanding of the Articles of Peace, what we have laid before, must here also be observed*. The more of grace and favour any Article contains, the more extensively it should be taken, and the more of rigour it hath, the more restrictively it should be understood. If we look at the bare Law of Nature, the greatest favour that can be granted, seems to be this, That every man should enjoy his own: wherefore where the Articles are ambiguous, such an interpretation should be admitted as may lead us to this fence, That he that undertakes a just War should receive what he fights for, together with his costs and damages; but not that he should get any thing more by way of punishment, for this favours of rigour which ought to be restrained. But because a bare acknowledgment of wrongs done, seldome procures a lasting Peace, therefore in Articles of Peace, such an interpretation should be admitted, as may according to the justice of War make the balance on both sides even, which may be done two ways; either by an equal compofure of all such things, as the Sword hath not as yet determined, according to the form of Ancient Right (which are the very words of Mettius in his Oration, wherein he differenceth of the severall forts of Leagues) or otherwise, as the Greeks say, Σκέαναι και Μαλαβος, That every man should keep what he hath.

Of which two ways of pacification, the latter, if the cafe be doubtful, is the rather to be believed; because as it is more facile, so it requires no alteration. Upon which that of Triphonius seems to be grounded, where he faith, That in Peace such Captives only are to return by Postliminy, as are comprehended in the Articles of agreement; as also where he faith, That Fugitives are not to be restored, unless it be so expressly agreed on, as we have already proved by irrefragable arguments. For by the Law of Arms we may receive such, and muster them among our own Troops: All other things by such an agreement remaining his that at present holds them; where the word [Hold] is meant of a natural not of a civil poiffession; for in War a poiffession in fact only is sufficient, neither is any other required. Fields (as we have already said) are then cppowed to be poiffed, when they are strongly secured by fortifications; for such as are for a while only encamp upon (as in Leaguers or Sieges) are not here to be regarded. Demosthenes in his Oration for Ctesiphon, faith, That Philip made haft to get into his poiffession what places he possibly could, as knowing that the Peace being concluded, whatsoever he could get, he should be able to defend, but things incorporeal cannot be kept, unless either by the things whereunto they adhere (as the Sciences of Tenants that are annexed to Mannors) or by deparing the persons whom they are, that whilft in a Country that is their Enemies, they shall not be exercised.

In that other kind of pacification, whereby the poiffession of things not yet determined by War are to be restored, we are to understand, That restitution is to be made to those who held the poiffession thereof last before the War began; yet so, that those private men that were cast out, might lawfully appeal to the Judge for either injunction or vindication.

But if any free People do voluntarily subject themselves to either Party that were in Arms, this Article of restitution shall not extend unto them, because it was intended only to such things as were done either by force, fear, or otherwise by such kind of fraud as is not lawfully used but against Enemies. Thus the Peace being concluded among the Grecians, the Thebans detained Platæa, alledging, That they were poiffess thereof by force nor treachery, but by the voluntary surrender of the Citizens. And in another place the same Author urgeth, That Platæa ought not to be restored because it submitted so soon to the Thebans of its own accord. By the same Law Nîsæa was detained by the Athenians. And the same distinction is used by Titius Quintius against the Etolians, who urging that the Cities of Thessaly might be set at liberty, was answered, That as to the Cities taken by force, that indeed was the Law, but the Cities of Thessaly did freely submit themselves to the Roman jurisdiction.
if nothing else be agreed on, yet this in every Peace ought to be presumed, that no Action shall be commenced for damages done in War, which is also to be understood of such damages as are received by private persons; for these also are the effects of the War. For where the cause of the War is doubtful, neither party will be willing to a gree as to condemn themselves of injustice.

Yet must not those Debts, which were due to private men when the War began, be accounted as pardoned: For these were not contracted by the Right of War, but forbidden to be exacted during the War; and therefore the War (which only hindered the exacting of them) being ended, the Debts remain in force as before. For although it ought not easily to be believed, that that which was a man’s Right before the War should be taken away, (for for this case chiefly, as Cicero observes, were Commonwealths and Cities at first constituted, That every particular man might be defended in what was his Right) yet ought this to be understood of that Right only, which ariseth from the inequality of things.

But as to punishments, it is not so; for this Right of exacting punishments, so far as concerns those very people or Kings that have contracted Peace, is therefore presumed to be remitted, left if any old grudge should remain unforgiven, there could be no firm or lasting Peace. Wherefore even those injuries which are as yet unknown to the Party injured, are usually comprehended in general words; as that face of the Cathaginians in drowning some Roman Merchants was remitted by the Romans, before it was made known to them; as Appius tells us. Optimae conciliaitationes quae tran in afferfumur memoriam deterrunt. Those are the best reconciliations that pacific all anger, and leave nothing in the memory unremit ted. For as Socrates very differently, In Peace non decet ante pecunia exequi; After Peace is ratified, to revenge former injuries is unseemly.

But there is not the same reason that this Right of exacting punishment should also be remitted by private men, because these may without War be judicially required; yet forasmuch as this Right is not so properly ours, as that which proceeds from inequality, and that the very exacting of punishments argues somewhat of hatred, therefore any flight interpretation of words will suffice to ground our conjectures, that this also was intended to be remitted.

Now whereas we said, That the Right which we had, before the War ought not easily to be believed to be remitted, this holds very true as to that Right which belongs to private men. But as to that which belongs to Kings and Nations, it will be more easily granted, if the words will but afford us whereupon to raise any probable conjectures to that purpose; especially if it were not a clear, but a controverted Right that was in Debate. For to believe that to be done whereby all occasions of a new War may be prevented, is generous; because, as the same Dionys. Halicarnassensis excellently observes *, Non tam cogitandum sit de faciendis in praesens amicitia, quam id curandum ne Rello verum impetunm, neque enim ad differs, sed ad afferenda mala convenirius: We are not so much to consider how to piece up a broken friendship for the present, as how to provide that we be not again involved in the same War hereafter. For our main design in this Treaty is not to put off the miseries of War, but to take them quite away. Which last words are borrowed from Socrates.

The Peace being once concluded and ratified, it is expedient that whatsoever is taken away afterwards must be restored; for from thenceforth all licence of War is taken away.

But among those Articles that concern the restitution of things taken in War, those in the first place will admit of a larger interpretation that is mutual, than those that concern one Party only; and next, those that respect Prisoners are to be continued with more allowance of favour than those that respect things; And among those that respect things, those that have relation to Lands ought to be more favourably understood than those that relate to Moveables; and even among these, such as are in the possession of the Commonwealth than those in the possession of private men. And among those Articles that command the restitution of things in the possession of private men, those are to be taken in the larger firbe that are possess under a gainful than those under a chargeable title, as things bought with our money, and things held in Dowry by Marriage.

To whomsoever any thing is granted by Articles of Peace, to him also is granted all the fruits and profits thereof, from the time of that conclusion, but not before; which Augustus justly defends against Sextus Pompeius, who having Peloponnesus granted unto him, claimed all the Tributes that were in Arrears for some years past, before the time of that Grant.

The names of Countries are to be taken, as they are at present used, not so much by the common people, as by such as are learned; for by such only are these Affairs negociated.

The aforesaid Rules are of such ufe, as often as reference is had to some precedent or ancient Agreement, for so often the Qualities and Conditions, express in that Agree-
Quintil. Dict. 238.

Of Pacem in underftood. All feeing it deny They doing in War. But let Contracts their to rous. There Ihould thirdly, but It makes broken difference the fhe makes broken difference by himfelf. That excufes may be admitted for some fhort delay in the performance of an Agreement, this holds not true, unlefs that delay be occafioned by an unexpected and unavoidable necefity. That fome of our Canons do feem to favour futh purgations, is no wonder; feeing that it is their defign to perfwade Chriftians to fuch things as promote mutual Charity. But in this Quefion that concerns the interpretation of Agreements, we enquire, not what is belt, nor what either pietry or Religion require of us but, what we may lawfully be compellec unto. All which is to be determined by that Juflice which we call external.

But where the words will bear a double fene, that interpretation is moft to be favoured which makes againft him that impofh Laws; becaufe he is ufually the moft potent Party. (The power, faith Hannibal, is in him that gives, not in him that demands Conditions of Peace.) As in other Contracts that are doubtful, the interpretation ought to favour the Buyer; for the Seller may blame himfelf that he did not fully express himfelf. But the other, receiving Conditions in words that will admit of divers fenses, hath a Right to accept of what is offered in that fene which is moft favourable to himfelf.

The words, the judicato of, faith Plautus; It is in him to fet the price that owns the Goods. In War, he prefcribes firt that is moft powerful; but in demanding Conditions, he firt speaks that is the weaker. So Sulla in Piurtarch, Eorum eft prius loqui qui opris habent Peace; Victoris fatis est taceres: Let them fpeak firt that is in need of Peace; it is enough for the Conqueror to be filent.

If it alfo frequently disputed when a Peace may be paid to be broken; for it is not one and the fame thing to give a caufe of War, and to break a Peace. But between thefe two the difference is great, as well to require punifhment from the Delinquent, as to vindicate the Faith of him againft whom the offence was committed in other matters. Now a Peace may be broken three feveral ways, firt, By doing that which is contrary to all Peace; fecoundly, in doing contrary to that which is plainly and expressly paid in that Peace; thirdly, In doing contrary to that which from the nature of every Peace ought to be ununderftood.

First, The Peace is broken when that is done which is contrary to all Peace; as when we are invaded by Force of Armes, there being no new caufe of War; which if with any probability it may be alledged, better it were fo to underftand it as if the War were fimply unjuft, than that it fhould be both unjuft, and alfo treacherous: Pacem non quicim vi arcent, fed qui praeors viim inferiori. They break not the Peace who repel force with force, but they who firt offer violence. Therefore Ammianus, speaking of the Romans, faith, That they properly gave back, because they would not be thought the firft Aggressors; yet afterwards, being urged thereby to neceffity, they gave Battel willingly. So likewise Procopius, in that Oration which Armenius makes to Cohors, They, faith he, are not alwayes to be accounted the Peace-breakers that are firft in Armes, but they who during the League are found treacherous to their Confederates. Thus alfo do the Moors in Procopius, They break not their League, who being firft injured, and publickly complaining thereof (in war) fly for succour unto others; but they who firft wrong those whom they owe as their Affociates: Neither do they make God their Enemy, who taking nothing with them but their own, fly unto others for protection; but they who invading other men Rights do enforce them into War to defend their own. This being granted, let us now examine by whom and upon whom, an invafion being made, the Peace is difolved.

There are fome of opinion, That if they that shall forcably invade us were but their Affociates, with whom we have made Peace, that Peace is broken. I deny not but that fuch a League there may be made, not properly, That one man fhould be punifhed for the fad of another; but becaufe that Peace feemed not to be fully and absolutely made, but rather under fome Condition, partly potefitative, and partly caufal. And yet that fuch a Peace fhould be made, unlefs it evidently lo appear, is fcarce credible; becaufe it is irregular, and inconformity with the common defign of thofe that make Peace. Wherefore they that do actually invade, being no ways affiliated therein by others, they only, and not their Affociates, fhall be judged the Peace-breakers; and againft thofe it fhall be lawful to make War. Contrary unto which, the Thebans did fometimes plead againft the Affociates of the Lacedemonians.

But what if they be Subjects that make fuch an invafion without publick Warrant or Authority? Then we ought to consider whether fuch a fact of private men be publicly approved of. For the better underftanding whereof, three things are requisite (as elfewhere we have declared) First, The knowledge of the fact; fecoundly, A power to punifh; thirdly, A neglect in them that could and ought to have done it. Their knowledge may easily be evinced, if the fact be publick and declared. A power to reftrain or punifh it is to
to be premised, unless it appears that they are Rebels. The neglect will appear by the space of time which Cities usually take to punish Malefactors: and such a neglect is equivalent to a publick Command. Neither is that of Agrippa in Seleucus otherwise to be understood, in saying, That the Parthian King had broken the Peace, for suffering his Subjects to march armed against the Romans.

Another Question is here usually started, Whether the Cæse be the same if Subjects take Armes, not by themselves but, under the Command of others. Surely the Cerites in Livy do thus excuse themselves, That their Subjects took Armes without any publick Warrant or Command from them. The like defence do the Rhodians make for themselves: But that opinion which favours more of truth is, That neither should this be permitted, unless it appear by very probable Arguments that it hath been otherwise customally done, as it is sometimes used now amongst some of the ancient Etruscans, amongst whom it was accounted lawful, Except omni Præda Prædam sumère: To take Armes on either side. Which custom, faith Polybios, was of that Force, That although they were not at War themselves, but their Friends or Associates only; yet it was lawful for the Etruscans without any publick Decree of their Senate to lift themselves on either side, and consequently to pillage both Parties. This is likewise the Tellimony that Livy gives of them, They suffer their Youth without any publick Order to serve in the War, with their Associates, or against them: so that oft-times in two contrary Armies, the Etruscans serve as Auxiliaries on both sides. Thus the Etruscans of old, although they denied aid to the Persians, yet if any of their Youth would serve them voluntarily, they would not hinder them.

Again, the Peace is broken, not only when the whole Body of a State or Kingdom, but if any of its Subjects shall by force of Armes be invaded, unless there be some new Cause of War given. For for this Cause is every Peace made, That the Subjects on both sides might live secure; it being an act of the City or Commonwealth, in behalf of the whole, and of every of its parts; yea and although there were a new cause of War, yet by Peace it shall be lawful for every man to defend both himself, and whatsoever is his. By Armes to defend our sibes against Armes, faith Cæcina, is that Right which Nature both gives us: Which Right cannot easily be premised to be renounced amongst Equals. But to revenge our own private Quarrels, or to recover by force what hath been taken away, is not lawful, unless judgment be first denied us: for this will admit of delay, but that of none. But if Subjects make it their continual trade of life to rob and pillage, contrary to the Law of Nature, so that it be apparent that what they do is contrary to the will of their Governors, and that no Court of Judicature can reach to punish them, such as are Pyrates, Robbers, or the like; from thee, as if they were surrendered unto us, we may both recover our damages, and revenge our selves of them by force of Armes. But to do the like to those that are innocent for that cause, is to break the Peace.

Although we are not as yet invaded, yet if our Associates be, the Peace is broken; that is, if they be such as are comprehended in the Peace, as hath been already proved in the Care of the Sanguinaries. Thus the Greeks in Xenophon allledge, Omnes nos omnibus servis juravimus; We have all of us sworn this Peace to all of you. Yea, though those Associates do not contract for themselves, but others do in their behalf, it is all one, in case it do sufficiently appear that they have ratified it. But so long as this is uncertain, they are to be held as Enemies. But for the rest of Associates, that are not expressly comprehended in the Peace, and for our Kinmen and Allies, that are either Subjects not nominated, or the Care is otherwise. Neither can an invasion of them amount to the breach of the Peace. But yet it will not hence follow, as we have elsewhere said, That it is unlawful for us in this Case to make War, but that the War so undertaken is not grounded upon the breach of Peace, but upon a new cause given.

The Peace is also broken, as we have said before, by doing contrary to that which is expressed in the Peace. Where, under the word [doing] we are to comprehend the not doing of what we ought to do, and when we ought to do it. Neither may we here admit any distinction between the Articles of Peace, as if some were of greater concernment than others. For what is worthiest to be inferred, is alfothought worthy to be observed. Yet should goodnes and common humanity prevail with all men, but especially Christians; to pass by small faults, but chiefly if repented of: For as the Poet speaks,

Quem paristi proficis, pereat innocens.

He's almost guiltles who is penitent.

But yet to the end that the Peace may be the better preferred, to these of smaller concernment, this Clause ought to be added, That in case any of them should be broken, it should not amount so high as to the breach of the Peace: But that such things should be first put

XXXI.

What if those Subjects fight under the command of another Prince. 
† Lib. 7. 10. 11. 
* Ad. Gell. 1. 9. 
+ Lib. 19.

XXXII.

What if our Subjects be invaded.

XXXIII.

If our Associates be invaded, the Peace is broken.
† See Book 2. Ch. 15. § 12. 
* Cod. Tri. 1. 15. 

XXXIV.

The second way of breaking a Peace.

XXV.

All the Articles of Peace are able to be obferved.
to reference, before it should be lawful to take Arms, which we find added to the Peloponnesian League recorded by Thucydides.

And I am clear of opinion that the same may be done in case some special punishment be inflicted in those Articles; not that I am ignorant that such an agreement there may be, That it shall be in the choice of the Party injured, either to accept of some punishment, or to null the Peace: But that the nature of the offence may be such, as requires rather that, than this. Besides, what I have formerly said and proved by the Authority of Hilorty is evident, That he that fulfils not his promise, being first failed, breaks not the Peace, for he is not bound but under condition.

But if the non-performance of what is agreed unto be occasioned through necessity, as if the thing promised be taken away or perished; or if what was agreed to have been done, be by any chance or casualty rendered impossible, the Peace shall not be deemed as broken: For (as we have said before) Peace doth not usually depend on such conditions as are casual. But the other Party shall be at his choice, whether he had rather expect the performance of that promise hereafter, if there remain any hopes that it may be done though late; or receive to the value of the thing promised; or lastly, whether he had rather be discharged from some other thing mutually promised, and answerable to that in this Article, and that is thought equivalent to it.

It is certainly an argument of great integrity in the innocent party to preserve the Peace, even with those who have often broken their Faith as Scipio did with the Carthaginians, notwithstanding their many peridious dealings with them; because no man can possibly cancel his obligation by doing contrary unto it: For although it be express that by such a contrary fact, the Peace shall be broken; yet is this so to be understood, that it shall lie in the choice of the innocent person, whether he will make such an advantage thereof or not.

Lastly we said, That the Peace may be broken by doing that which is contrary to the special nature of every Peace.

Thus those things that are done contrary to Friendship, do break that Peace that was contracted under condition of Friendship: for look what the duty of friendship may require from others, ought also to be performed by the Right of this agreement. And to this, though not to every Peace (for some there are that are not tied up to this condition, as Pomponius obser
des) may we refer many of those dissertations, which Civilians handle concerning such injuries and contumelies as are committed without force of Arms, and particularly that of Tullv. If after Peace made any thing be committed, it shall not be accounted as a bare neglect, but as a willful breach; neither shall it be imputed to impudence, but unto perfidy unjustly.

And even here also (as much as in us lies) we are to take care that we judge not of the fact invidiously; if therefore an injury be done against either our Allies, or Subjects, it shall not be imputed to him with whom we have made Peace, unless be it evident that it was done by his inclination. According to which natural equity, do the Roman Laws proceed concerning such acts of cruelty as are done against Servants; as Adultery and Rapi
dment are imputed rather to acts of unbridled lust than of hatred; and so the invading of another man Right is adjudged as an act of Covetousness, rather than of Treachery. Cruel threatenings whether by words or signs, unless it be upon some new caufe given, cannot confit with friendship, no more than can the creeding of new Forts and Bulwarks upon the Frontiers, when it is manifest that they are not so much for defence as offence; To allo, the more than ordinary preparations for War, either by Sea or Land, if he with whom the Peace is made have ground enough to believe that they are made against none, but against himsclf.

The reception of such particular persons as are willing to transplant themselves from one Princes Dominions to another, is no breach of Friendship, for this freedom is not only natural but benign; whereunto we may likewise add the receiving of Exiles: for as I have elsewhere proved out of Euripides, over such the City or Prince that banished them, can have no power. What advantage is it, faith Persius in Livi, that every man hath power to banish himself, if there be no place left him to fly unto? And this Euripides calls a right common to all mankind to receive persons banished. Solon would not admit that any strangers should be enrolled among his Citizens, but such as had been for ever banished their own Country, or such as came with their whole Families to Athens, there to exercise some Craft or Manufacture. Persius in Appian pleads thus with the Romans, concerning his receiving of some fugitives, What I did, faith he, was justifiable by the common right of
of all mankind, which you yourselves also do sometimes: which likewife is usually confirmed by mutual Covenants, as may appear by that Peace made between the Romans and the Persians. The like doth Salluste of the Arabes, who whilom the Kings of Syria were at War among themselves, obtained this liberty, That they might receive what Fugitives they pleased, but fend away none. But as to walled Towns, or any great Multitudes, which did constitute any one entire part of a City, that it is not lawful for any Prince to receive them, we have already proved. This was the caufe of the War between the Persians and the Romans, because King Lysan at the solicitation of the Conful had revolted to the Romans. Neither is it lawful to receive such as are bound, either by Oath, or otherwife to perform duty or service to another Prince. The like hath sometimes been introduced by the Law of Nations among some people concerning such as have been by the chance of War made Slaves: but as concerning the detraction of such, who are not banifhed, but do fly to avoid condigne punishment, we have elsewhere treated.

To determine a War by lots is not always lawful, but then only when we have an absolute propriety in the thing contended for; for Cities are to be defended for the preservation of the Lives, Goods, Chafftities, and such like of their Citizens. And Kings are more strictly bound to defend the general safety of their Kingdoms, than to omit those means which for their own and others defence are most natural; but yet in cafe, he that is unjustly invaded, hall upon due examination find himself too weak to make any considerable reftinance, it may feem lawful for him to refer the quarrel to the chance of a lot, that so by exposing himself to a danger that is uncertain, he may avoid one that is certain, of which two evils the leffer is to be chosen.

But here follows a cafe very much disputed, namely, Whether it be lawful to determine a War by the facces of a Battel fought by an appointed number of Combatants, as between on each side one, as that between Tunis and Ancar, Mentelus and Paris; or between on each side two, as between the Atheans and the Athenians; or between on each side three, as between the Roman Horatii and the Arabus Curatii; or between on each side three hundred, as between the Lacedemonians and the Argeves; Whereunto I anfwier, That if we look no farther than unto the Law of Nations, which is external, without doubt, such a decision is lawful; for by that Law every man may destroy his Enemy any way: But if according to the opinion of the Ancient Grecians, Romans, and other Nations, every man hath an absolute power over his own life, then surely there is nothing therein repugnant to internal justice. But this opinion (as we have often faid) is contrary not onlie to right reason but to Gods precepts; for to kill a man for his detaining of such things as we may well spare, is as we have already proved, to transgrefs the rules of Charity. Whereunto let us now add, That if he to whom God hath given life as a bleffing, shall fet fo meanly by it, as to cast it away for a trifle, he finds both against God and his own Soule. If the thing contended for be worthy of a War, as if it be undertaken to preserve the lives of many innocent persons (as Harles the fifth Emperour pretended when he challenged Francis the first King of France to a single Combat) in this case we ought with all our power to endeavour it; but to make use of a fet Combat, either as a trial of the goodnefs of our Caufe, or as an instrument of Divine judgment, is vain and abhorrent from true Piety. There is but one only cafe which renders such a Combat just and innocent, and that too but on one side only, which is when nothing can reasonably be expected, but that he who maintains an unjust cause, will otherwise be certainly the Victor, and will prosecute his Victory to the destruction of a multitude of Innocents. Now he that shall in this cafe adventure his life, whereby he conceives any probable hopes to prevail, must needs be innocent, or at leaft so reputed. But yet we cannot deny, but that many things, though not exactly done, yet may be by others, if not well approved of, yet permitted for the prevention of greater mischiefs, which could not otherwise be avoided. Like as in many places, grappling Ulifyr and publick Stews are at this Day tolerated. Wherefore in that cafe formerly put, of two perions pretending with equal titles to one Kingdom which cannot be divided, if they shall offer to try their fortunes in such a Combat, the people may safely permit them for the prevention of a more general calamity, which must otherwise necessarily ensue. The like may be said where such a Combat may put an end to any bloody War. Thus did Cypry challenge the King of Assyria; and Matus in Dionysius Halicarnaeffifer thus concludes, That seeing that the content did not concern the power or dignity of the Nation but of their Princes only, it was but reasonable that they only who were concerned should decide the quarrel by Armes between themselves. Thus did the Adriapolitans anfwier Mahomet, when he and Mofa Zitches contended for the Ottoman Empire.
And so we read of sundry challenges made by several Pretenders to one and the same Kingdom, as of that which Charles the Fifth sent to Francis the first King of France; and of many Duels fought in such Cases, as that of Heraclius the Emperor with Cofroe Son to the King of Persia.

Where alfo we muft note, that they that caft their Fortunes upon the Tryal of such Combates, may haply lose their own Right, if any they had, to the thing contended for. But they cannot transfer any Right to another, unlefs the Kingdom contended for be Patrimonial. And therefore, for the confirmation of such Agreements, the content, not only of the people but, of such as have any Right to the Succifion, if there be any then born, would be necessary. And fo it is the confent of the chief Lord in thofe Estates that are not free.

It is likewise frequently disputed (where such Combates are permitted) which is the conquering Party, feeing that neither of them can be faid to be absolutely conquered, unlefs all the Combatants on one fide be either killed or put to flight. As in Livy, he that forfaking his ground fhall retreat either within his own Bounds, or unto places of Strength, is faid to be conquered. Amongf.thofe three famous Historians, Herodotus, Thucydides, and Polybius, we read of three Questions proposed concerning Victory; the firft whereof concerns this of fet Combats. But he that judiciously weighs it, fhall find that both Parties departed the Field without any true Victory. For the Argives were not put to flight by Odryades, but marched away by Night, fitdefally believing, and as confidently proclaiming themselves Conquerors to their own Country-men. Neither were the Corinthians routed by the Corcyreans, but having fought it out gallantly, and receiving a ftrong Fleet of the Athenians near them, without endangering their Forces with the Athenians; they made a fafe retreat. But Philip King of Macedon having taken a fingle ship of Attalus, forfaken by her Mariners, though he were far enough from destroying his whole Fleet; yet thereupon (as Polybius notes) rather carried himfelf like a Conqueror, than thought himself one. And as to thofe other things which, as well Livy in feveral places as, the Authors before recited, do put down as figns of Victory; as the taking of the Spoil, the granting leave to bury the dead, and the offering Battel a fecound time: Thofe they carry fome fiew of Victory, yet of themselves prove nothing; but as they are backt with other more defcructive Arguments of the Enemies Flight. Plutarch, concerning Agesilus, writethus, Having given the Enemy leave to bury their dead, and thereby gained to himfelf the honour of being Conqueror, he went to Delphos. So the fame Plutarch in the life of Nicias proves both by Law and Cuftom, that he who caves leave to bury his dead, feems thereby to deftain the Victory. Neither had he that they craved this leave any Right at all to erect Trophies. But this (as I have already faid) is no infallible fign of Victory; and yet where the Victory is otherwife doubtful, he that firft departs the Field may more probably be thought to fly, than he that keeps it. But where there are no certain figns of Victory, there every thing is to remain as before the Fight; and fo both Parties are either to prosecute the War, or to draw to a new Agreement for Peace.

Concerning Arbiters, Proculus informs us, That they are of two forts, whereof the one makes no Authoritative, that whether his award be juft or unjuft it muft be obeyed: which (faith he) is to be observed whensoever both Parties do engage themfelvcs to fland to the determination of a third perfon. The other he makes to be lef binding; as when both Parties are content to refer their Caffe to be moderated by fome indifferent perfon: An example whereof we have in that Anfwcr of Celfus, If the Servant, being made free, fhall swear to perform fuch services as his Patron fhall think fit to impose upon him, the impofition of the Patron fhall not be binding, unlefs what he impofeth be equal. But this interpretation of an Oath, though haply it might be warranted by the Roman Laws, yet can it not agree with the plain and genuine fene of the words fimpfly taken. But yet this is very true, That the word [Arbitrator] may be taken in both fenses, either for a Moderator only, fuch as the Athenians were between the Rhodians and Demetrius; or for an absolute Judge, whose Sentence muft be obeyed. And in this fene we here take it, as also we did elsewhere, treating of the mean of how to prevent a War. And yet even againft fuch Arbiters, to whose award both Parties have mutually promised to fland, it may be provided by the Civil Law, as in fome places it is, That Appeals fhall be granted and Bills of complaint admited. But this cannot be between Kings or between Nations, for here can be no fuperior Power that can either hinder or dissolve the obliging power of the promise. And therefore whether the Sentence be right or wrong, we muft be concluded by it. So that what Pliny fometimes faid may very fitly be applied hither, Summa quique Caufe ju fl Judicium facit, quemcumque legis; Every man makes him to whom he refers himfelf, the supreme Judge of bis own Caufe. This alfo we muft add, That it is one thing to discourse concerning the Duty of an Arbitrator, what he ought to do; and another thing to treat of their obligation that are content to refer their Caufe to fuch an Arbitrement. For as though there were a Law among the Cities of Italy, That one Kinffman should not go to Law with an-
Chap. xx.

War ended by Arbitration.

ther, but that all differences should be determined by Arbiters chosen on purpose; yet notwithstanding this Law, there were some Cafes wherein they might refuse such a reference. So also there may be some Cafes and some Reasons why Princes may refuse to put their differences to Arbitrement. Amongst which, this is not the least, When no assurance can be given that the persons referring will stand to the award, Quis alternarum consilio domum, qui conventis frater noster et? faith Aurelius to Mark Anthony; Who shall compel him (of us two) that refuseth to be determined by the Sentence of our common Judge or Arbitrers? Private men may be compelled to stand to an Agreement by the publick Magistrate, but who shall compel Princes that have no Superior? Other Reasons also there may be; as that of Philip King of Spain, who refused the Pope to be Arbitrator between himself and other Competitors, for the Kingdom of Portugal; because the Pope claimed the decision of all such Controversies as his Right: wherefore that prudent King was unwilling to add his own Example to some ancient ones, whereby the Pope might be helped himself to be the sole Arbitrator of Kingdoms.

That which is to be confidered in an Arbitrator is, Whether he be chosen as a Judge or a Moderator, which was the proper Office of an Arbitrator, as Seneca thought where he tells us, That a good Cause is better referred to a Judge than to an Arbitrator: Melior videtur condiio bona Cause si ad judicem quam si ad Arbitrum mutatur; Because a Judge hath a constant Rule to walk by which he must not transgress; whereas an Arbitrator being freed from the Shackles of the Law, hath liberty to judge according to equity and good conscience; and therefore can either add or detract from the rigour of the Law, and give Sentence, not always as Justice shall exact; but sometimes as pity and humanity shall direct. Aristotle reckons it as a Duty of an honester and a frugal man to refer his Cause to an indifferent Arbitrator, rather than to a severe Judge, Arbitrator id quod equal est, reipr, Jus in Legem; For an Arbitrator looks at that which is righteouns, but a Judge at that only which is legal. And therefore is an Arbitrator made choice of, to the end he may rebuke the edge of the Law, or otherwise supply that wherein the Law is defective. For equity in this place doth not signify (as elsewhere) that part of Justice that expounds the general words of the Law, nearest to the mind of the Law-maker; for even this also is the Office of a Judge; but every thing that is better done than not done, although it be not according to the strict Rules of Justice properly so called. But such Arbiters as they are very frequent among private men; that are Fellow-Citizens or Subjects to the same State, and are highly commended, especially to us Christians, by St Paul, 1 Cor. 6. so in such Cases as are ambiguous, we are not to allow them so much power as to determine of them. For in these we are to follow that fene that hath the least of doubt in it; but especially when the dispute ariseth between two Sovereign Princes, who having no common Judge between them, may be premedised to restrain the power of Arbiters within those strict Rules of Justice which Judges are usually confined to.

Where this also is to be noted, That such as are chosen Arbiters by a People, or such as have the Sovereign Power over them, ought to give Sentence on the principal matter, not to intermeddle with Poffessions; For the judgment of these belong to the Civil Law. By the Law of Nations, Dominions follow the Right of Poffession; and therefore till the Cause be tried, no innovation ought to be made, as well to avoid prejudice, as because the recovery of things out of poffession is difficult: Wherefore Livy in his Book of Pleas between the Carthaginians and Massinissa, hath this Observation, Legati jus poffessionem non mutatur, Arbitratores do notier of the Right of Poffessions.

There is also an afluming of an Arbitrator, but of another kind; when a man yields himself up to the judgment of his very Enemy, which is a pure and absolute surrender, wherefore if he makes himself a Slave, and gives his Enemy Sovereign Power over him. Thus the AEtolians in Livy were demanded in the Senate, Whether they would submit themselves to the Judgment of the Romans. This was the advice of L. Cornelius Lemulus, as it is recorded by Appian about the end of the second Punic War, concerning the affairs of Carthage. Let the Carthaginians, faith he, Submit themselves to our censure, as the Vanguished usually do, and as many others have formerly done; then we shall be more thankful they will be for what we shall give them. Neither shall they call this a League, for the difference between a League and this is great. For if we enter into a League with them, they will never want some plausible excuse to break it, allying, That they had been first injured in some part of it; for seeing that many words in that League will admit of a doubtful interpretation, they can never want a pretence that have a mind to cavil. But when we shall have disarmed them as Prisoners, and made them our Slaves, then at length they will perceive, That they have nothing that is proper by their own; and then they will defend, and whatsoever we shall afterwards give them they will thankfully accept of, as of a mere gratuity. But here also we must distinguish what between what the Conquered ought to suffer, what the Conquerour by the Right of his Conquest may do, and lastly, what most of all becomes him. The Conquered Party having yielded themselves, ought to suffer whatsoever the Conquerour will impose upon them; for being perfectly inflaved, if we respect that Right of War that is external, they have nothing

XLVIII.

Arbiters in Cases dubious, cited up to Law. * Lib. 2. de R. f. c. 7.

Equity, what.

XLIX.

Arbiters, not to judge of Poffessions.

What the power is of a pure Deduction.

Lib. 57.

Lib. 14.
but what may be taken from them, even their lives and personal liberty, much more their Goods, whether they be those that are publick, or those that belong unto them, as private men. The *Aetolians*, faith Livy, having yielded themselves to the will of their Enemies, dreaded nothing more than corporal punishments. And, as we have elsewhere said, When all things are surrendered, it rests in the choice of the Conqueror what he will take away, and wherein and how far he will punish the Conquered. Pertinent wherunto is that of Livy. It was the ancient custom of the Romans, when they had to do with a people or a King with whom they were not joined in friendship, either by League, or by equal Laws, to use their Sovereign Power over them, as being at peace with them, until they had first delivered up unto them all things both Divine and humane, and until they had received their Hostages, taken away their Armes, and had placed Garrisons in their Cities. Yea, and sometimes they that thus surrendered themselves might be killed, as we have elsewhere hevew a.

But the Conquerour, that he may do nothing unjustly, ought in the first place to take care that no mans life be taken from him, unleis it be for some crime that deserves death. As also that no mans Goods be taken from him, unleis it be by way of a just punishiment. For in the Conqueror there is nothing so honourable, nor in some Cases so necessary, as in this manner to extend his clemency and liberality to the Conquered, so far forth as it may stand with his own security. When Cyrus had subdued the *Alyrians*, he comforted them by this assurance, That their Condition should be the same that before it was, their *Houses*, *Lands*, *Wives* and *Children*, they should freely enjoy; and in Case any personal injuries were offered them, both he and his would readily defend them. Admirable are the effects of thole Wars that are concluded with a general pardon. Thus did *Nicholas* the Syracusan plead in *Diolorus* in the behalf of thole that had yielded to mercy, They have, faith he, yielded themselves, and given up their Armes, reyeying wholly on the Conquerours clemency: Quare indignum forer, eos decipi sive noftra humanitas? Wherefore it should be an everlasting diffidence to us to suffer them to be deceived in their confidence they have of our clemency. And a little after, Who amongst all the Grecians did ever inexorably condemn them to punishment, who yielded themselves to the Conquerrors mercy. *Appian* brings in *Ollavius Cesar* thus bespeaking *L. Antonius*, when he came to surrender himself, If the end of thy coming hither had been to purchase thy Peace only, thou hadst found me, not only a Conquerour, but such a Conquerour as was throughly incensed by the wrong thou hast done; but since thou art come to yield thy self, thy Friend, and thine Armes to our disfision, thou hast appeased mine anger, and taken away from me that power I had to have enforced thee to have accepted of what Conditions I pleased. For I am now to weigh, not so much what thou dost request, as what becomes me to grant; wherefore I shall chuse rather to consult mine own honour by forgiving, than to gratifie my passion by a just revenge. We do often meet with these expressions in the Roman Stories, namely, That the Conquered do yield themselves sometimes to the faith, sometimes to the mercy or clemency, of the Conqueror. As in Livy, To those Ambassadors that were sent from the Neighbour Provinces to surrender the *Cities* to the faith of the Romans, he gave a pacific Audience. So in another place, speaking of King *Pericas*, he faith, Paulius earnestly laboured, that he might be permitted to surrender both himself and whatsoeuer was his, to the faith and clemency of the *People* of Rome: Whereby nothing else but to be underoord but an absolute rendion. For the word [Faith] in this and the like places, signifies nothing but the bare honestly and goodnes of the Victor, unto which the Vanquish'd submits himself. There is a notable Story extant both in Livy and Polybius, concerning one *Phanes* an *Iolian* Ambafladour, who in his Speech to the *Consf Confii* *Manius* let fall these words, That the *Aetolians* did freely surrender themselves and all they had to the faith of the same People of Rome: Which (being thereunto urged by the Consil) he re-affirmed in the very words. But when the Consil demanded the principal Authors of the War to be immediately delivered unto him, *Phanes* readily anwered, That it was only to the faith, and not to the Subjection, of the Romans that they submitted themselves: Adding, That it was not the cufom of the Grecians to be commanded; whereunto the Consil replied, That he cared not what the manner of the Grecians was, but the cufom of the Romans was to impose Laws upon those who by their own concession had surrendered themselves: And immediately commanded the Ambassadors to be clapt up in Chains. *Polybius's* words are to this sense, Do ye, having newly surrendered your selves unto our truft, teach us what we must or ought to do? By which words it is evident what to whole faith any people do commit themselves may do with impunity, and without violating the Law of Nations. But yet the Roman Consuls did not make use of their power so as these Historians have reported, They only disnift the Ambassadors, and gave the *Aetolians* longer time to consult about it. Thus did the people of Rome answer the *Falisci*, as *Valerius Maximus* informs us, That they very well understood that the Falisci had surrendered themselves not unto the power, but unto the faith of the Romans: And of the *Campaens*, That they had put themselves under the Romans, not by any League but, by a voluntary surrender. Now
as concerning his Duty unto whom such a surrenderer is made, that of Seneca is very
pertinent, *Clemente liberum arbitrium habet, The Conqueror may shew what clemency be
pleas'd; *but yet be ought to give Sentence not as a Judge according to the rigour of
Law, but according to equity and good confidence, *he may either absolutely forgive, or be
may exact whatever satisfaction be pleas'd. Nor do I think it much material in what
form of words such a surrenderer is made, whether to the Conqueror's wildom, or to his
moderation, or to his mercy and clemency. All these being but palliations, the main
thing intended is, *That the Conqueror must be Judge.
Yet there are also Conditional Surrenders, which make provision either for every
peron, as when their lives, liberties, or some part of their Goods are expressly excepted;
or for the generality, and amongst those some may amount even unto a Mixt Govern-
ment, whereof we have elsewhere discoursed.
To the Articles agreed upon for such a Surrender, there succeeds in the next place
Sureties for their performance; and these are either Hoflages or Pledges. Hoflages
are either such as freely give themselves, or such as are sent by the Prince or State.
For in all Civil Governments, he that hath the Sovereign Civil Power hath a Right
as well to the actions, as to the Goods of his Subjects; but so that the Prince or State
that sends them are obliged to satisfie either them or their Relations, for the
lofes and damages they shall thereby suffer. And in Cafe there be many nominated
to be sent, and it be indifferent to the Commonwealth whether of them goes, it
is best to determine it by Lots. But yet he that is only Lord of the Fee hath no
such Right over his Vassal, as to send him, unless he be also his Subject; for the
reverence and obedience due unto him doth not extend so far.
That an Hoflage may be put to death by that Right of Nations which we call ex-
ternal, we have elsewhere shewed. But not by that which is internal, unless for some
crime of his own, he hath deserved it. Neither can they be made Slaves: Nay farther, they
may by the Law of Nations enjoy and leave their Goods to their next Heirs; although
by the Roman Laws it is provided, That their Goods being confiscated, should be
brought into the publick Treasury.
But whether it be lawful for an Hoflage to make his escape, would be likewise
enquired. Certainly it is not, if either at his first entrance, or at any time after, to
the end that he might live under a more gentle restraint, he engaged his word, That
he would not. Otherwise it was not the purpose of the City or State in sending
their Citizen to oblige him not to fly; but to empower the Enemy to keep him in
such a strict custody, that thought he would, yet he could not fly. And thus may that
Fact of *Caelia be defended, who made her escape from *Perseus, to whom she was sent,
with other Ladies, as Hoflages. But admit that *Caelia had not at all offended in mak-
ing her escape, yet could not the City of Rome justify her reception and detention.
Which made *Perseus declare plainly, That unless they sent back his Hoflage, he would
take it to be a breach of their League. Whereupon the Romans immediately restored
her, as a Pledge of their Peace.
But this kind of affurance by Hoflages is to those who are sent very odious, as well
by reason that it deprives them of their liberty, as because it is occasioned by the fac-
of another. Wherefore in all Cafes that are dubious, we are to understand it in the
strictest sense; as that they that are sent as Hoflages in one Cafe, cannot be detained as
Hoflages in another. Which is so to be understood, That when the latter Agreement was
made, there was no mention at all made of those Hoflages. But if we have already
broken our faith in any other Agreement, or if there be any Debt justly due, then those
Hoflages may be detained, yet not then as Hoflages, but as Subjects, which by the Law
of Nations may be taken and kept as Prisoners for their Sovereign's Debt. Which very
thing may also be easily prevented, by inferring this Clause amongst those Articles, That
so soon as that, for which they were sent, shall be performed, those Hoflages shall be
freely sent back:
He that is sent as an Hoflage to release for a while either a Prisoner or another Hoflage,
this dying, the other shall be releaved. For when the person dyed that was the
Hoflage, all the Right that any man had in him as an Hoflage, dyed with him; as *Upi-
ian speaks in the Cafe of a redeemed Captive. Wherefore as in *Upian's Cafe, the
rancome is not due, if the Captive dye before it be paid; so in this Cafe, the per-
son substitutted cannot lawfully be detained, if the principal Peron be defunct. It
was then no unreasonable Demand that *Demetrius made to the Roman Senate, in de-
fiing to be dismiss'd, as being no longer an Hoflage for *Antiochus, he being dead.
Which very Plea, *Jasine alfo out of *Trogus records and approves of, where he faith,
That as soon as *Demetrius heard that his Brother *Antiochus (for whom he remained as
an Hoflage in Rome) was dead, he immediately address'd himself to the Senate, telling them,

\[BBB\]
That whilst his Brother lived he was contented to be his Pledge; but he being dead, he would gladly know whose Hostage he then was.

But what if the King dye that made the Hostage, shall his Hostage be detained? Of this the Answer depends upon that which we have heretofore handled *, namely, Whether the League so made be personal only, or real. For Accesories cannot justify us in receding from that general Rule which we ought to walk by in the interpretation of Principals, whose nature they themselves ought to follow.

But here by the way we must add, That Hostages are not always bare Sureties in the Obligation, but sometimes the principal Parties; as when in an Agreement one man engages himself for the fact of another, which if not performed, he himself is to make it good: and thus Hostages in his stead may stand obliged. Thus it was adjudged in that Sponson made at Canda, as we have elsewhere declared *. But their opinion who hold, That Hostages may stand obliged one for the fact of another, though done without their consent, is not only rigorous, but unjust.

Pledges have some things common with Hostages, and some things they have peculiar to themselves. That which they have in common is, That they may be detained for another Debt, at present due, unless faith be given to the contrary. That which they have peculiar is, That what Contract soever is made concerning these, will admit of a larger construction than those made concerning Hostages. Neither is the one so distasteful as the other: for that things should be kept strictly is natural; but that men should be so kept, is not so.

Lastly, That length of time cannot prejudice the Right of Redemption as to things so engaged, if that be performed for which they were originally deposited, we have elsewhere proved *. For that act that was done upon an ancient and known Agreement cannot easily be believed to proceed from a new one; and therefore that the Debtor forbears to redeem his Pledge, is no good Argument to prove his dereliction of it, unless some other strong conjectures do induce us to believe otherwise: As in Case a man being by some means hindered when he would have redeemed it, had pass’d it over in silence so long as was sufficient for him that detained it to ground his conjectures that we had forfaken it.

CHAP.
C H A P. XXI.

Of Faith during War, of Truces, Safe-Conduct, and the Redemption of Prisoners.

I. What a Truce is, and whether it be a time of Peace or War.
II. The derivation of the word Inducie.
III. It being ended, there needs no new denouncing of War.
IV. How the time prefixed for a Truce is to be computed.
V. When Truces begin to bind.
VI. What during that time may lawfully be done.
VII. Whether to retreat to repair breaches, &c. be lawful.
VIII. A definition concerning possession of places.
IX. Whether he that is actually detained till the Truce be ended, hath afterwards a right to return.
X. Of the special agreements for Truces, and what questions do thereupon usually arise.
XI. Upon the breach whereof the War returns.
XII. What if some punishment be thereunto added.
XIII. When the acts of private men break the Truce.
XIV. A Safe-pas when there is no Truce, how interpreted.
XV. Who are comprehended under the name of Souldiers.
XVI. To go, to come, and to return, how to be understood.

XVII. How far a Safe-conduct extends to persons;
XVIII. And how far unto Goods,
XIX. Who may come under the name of Attendants, and who under the name of a Nation.
XX. Whether a passport be valid, be dying that gave it.
XXI. What if it be given during pleasure only.
XXII. Whether security be due, without or beyond his Territories that gave it.
XXIII. The redemption of Prisoners, a favour.
XXIV. Whether such a redemption may by any Law be forbidden: explained.
XXV. That the Right a man hath to his Captive may be transferred.
XXVI. The ransom of one Captive may be due to more.
XXVII. Whether a ransom agreed upon may be null'd, if the estate of the person be then unknown.
XXVIII. What goods of a Prisoner are his that takes them.
XXIX. Whether an Heir may be charged with a Prisoners ransom.
XXX. Whether he that is released, to release another be bound to return, if that other be dead.

H E R E are some things which Sovereign Princes even in the midst of War, do usually grant one to another, which Virgil and Tacitus call, Belli Commercia, The Traffick of War; and in Homer are said to be omnibus, Mutual Agreements or Covenant of War. Such are Truces, Safe-Conducts, and the redemption of Prisoners. A Truce is an agreement, whereby though, the War continue yet, all acts of hostility do for a while cease, though (as I said) the War continue. For, as Cicero speaks, between War and Peace there is no Medium; it may be called a War, although at present its operations are intermitted: As, A man may be said to be wise or prudent, though he be asleep; and virtuous, though for a while he be void of action. The distance of place, faith Aristotle, doth not dissolve friendship itself, but interrupts the exercise of it. An habit there may be, though at present it operates not. For, as Enfratus well observes, An habit being compared with an ability fumply taken, is called an act; but being compared with action is self, or the exercise of that ability, is called power; as a man may be an excellent surveyor, or a skilful Architect, though present he be fast asleep. Eft difertus etiam qui tacit; A man may be eloquent though for a while he be silent: and a good Workman, though he have no tools to work with. So then as Gallus sometimes said, Neque Paze elf inducie, Bellum manet, pagna cessat: A Truce cannot be called a Peace; for though the fight cease, the War continues. So Pacatus in his Panegyric, Inducie Bella suspendebant; A Truce is but the suspension of the acts of War. Which here I have the rather mention, that we may understand, That whatsoever is agreed upon to be of force during the War, is also of force during the time of a Truce; unleas it plainly appear, that it was not the state of War that was so much looked at, as the exercise of it. On the contrary, if any thing be agreed upon as concerning Peace, that is of no force in the time of a Truce: Neither am I ignorant that Virgil calls a Truce, Pacem fugiendam; An indifferent Peace, or a thing between Peace and War; And that Servius upon that place calls it a temporary Peace. As also doth the Scholiast upon Thucydides: Varro calls it The
Of Faith in War, Truces, Safeguards, Redemption of Prisoners. BOOK III.

The Peace of Camps for a few days, all which are rather descriptions than definitions, and those also but figurative; such as was that of the same Varro, who calls a Truce Wars Holyday, who might as well have call'd it Wars napp or short sleep. As Papias calls those Days whereon there are no pleadings, Days of Peace. And as Aristotle called sleep, Vinculum senium; The lock or chain of the senect: By whose example we may rightly call a Truce the fettlers of War. Which exposition of Varro (which also Donatus follows) Gellius deservedly blames for adding therunto, for a few days, as if there could not be a Truce made for a few Hours. Whereunto also I may add, for Years; nay, for twenty, thirty, forty, yea a hundred Years: Examples whereof we may find in Livy, which serves also to confute that definition of Pausan, Inducia junctum in breve, or pro tempus conventus, non invicem lacessant; A Truce is when by an agreement, neither party shall at present, or for a short time prefix, provoke each other to acts of hostility. But yet possible it is, that if it shall evidently appear, that an absolute cessation from all Hostile Acts, was the solitary reason simply and wholly moving both Parties to make such an agreement, that then whatsoever is said concerning a time of Peace, may also be said concerning the time of such a Truce, not simply by virtue of the word [Truce.] but by a certain conjecture that it was the mind and intention of both Parties, that that Truce should be equivalent to a Peace, whereof we have already treated in another place.

This word Indicia, which signifies a Truce, is not (as Gellius would have it) derived from Inda ut in am, for then, as it is now: Nor (as Opilius thought) from the word Endioi, or Endioiun, which signifies an Entrance into, or a beginning of; but rather from these words, Quad inde, that is, That there should be rest from such a time; or as the Greeks call it, A cessation of Armes from thenceforth. For it is confett both by Gellius and Opilius, that the word, Indicia, was by the Ancients wrote with a [r.] and not with a [c.] thus, Indicis; and that what they now use in the plural, was doubtable of old ufed in the singular number, the Ancient word being Endoia: As, for Oium, Rest, they then pronounced, Oistum, from the word Oiti, which we now pronounce Oiti: As also of the word Poina (for which we now ufe, Pena, Punishment) is made Punio, and of Poinus (now Punus) is made Punios; So of that word, Oistio, Oistium, is now made Oistia, Oistio; and of Ofreo, Ofreorium, is now made Ofreio, Ofreio; So of Endoia, Endoiontum, is made Endoia, Endoia, and from thence Indicia; whereas the plural number is now only in ufe. Neither was Denoniius much amifs, who would have Indico, to be derived from Io dixit oium, A rest for some Days. A Truce then in War is a rest or ceflation, and not a Peace: Therefore some Historians do exactly distinguish them, when they say (as they often do) Pacem negatam, inducia datat; That though a Peace was denied, yet was a Truce granted.

Wherefore this time of a Truce being expired, there needs no new denouncing of War, for that which for a time hindered it, being taken away, the War presently starts up and enjoys its own Rights, being during that time not dead, but asleep, just as the Dominion or Jurisdiction that a State hath over a madman, doth, as soon as he recovers from his madness. But yet we may read in Livy of a War, that by the judgement of the College of Heralds was denounced after the expiration of a Truce: But then we must know, that it was the custom of the Ancient Romans to make use of these unnecessary cautions and premonitions, to shew how much they loved Peace, and how unwillingly they made War though their Cauze were just, it being usual with them, Bellum indicere ne inforrent; To proclaim War to the end that they might make Peace. And this Livy himself seemed to hint, where he faith, That after, a pitch Battel had been fought with the Veiotes at Nomentum and Fidenza, there was indeed a Truce granted, but no Peace made; which Truce being ended, though they had before broken it, yet were the Heralds notwithstanding firm, who receiving no satisfaction to their demands, denounced War.

The time alligned for a Truce is either continual, as when it is made for an hundred Days; or by prefixing a time when it shall end, as until the Calends of March. In the former, the account must be to the last moment; for this is most natural. For that account which is made by days Civil, depends upon the several Laws and Customs of Nations. In the other kinds of allignments, it is usuall question, Whether the Day, the Month, or the Year, whereon any Truce is to determine, ought to be included or excluded the time of the Truce. Surely all natural things have two Bounds whereby they are terminated, the one within, or adhering to the things themselves, as the Body is terminated by the Skin, being the utmost part of it; The other outward, as a River is the Bound of the Land. Now according to either of these two ways, may those Bounds that depend upon the will be alligned. But yet those are most natural, that are a part of the thing bounded. So faith Aristotle, Terminus dicitur, quod ultimum eis situ est; That it is said to be the end of any thing which is the extreme part of it. Neither is this repugnant to com-
mon use. For if a man promise to do a thing before the day of his death, it shall include that very day wherein he died. Spurina forewarned Cæsar of some danger that should not be protractec-
by the Ides of March; and being warned by Cæsar as a false Prophet, because the Ides of March were already come, yet no danger had befaln him; he replied, Veni, veni, etc, sed non praeterisse, That they were indeed come, but not past. Wherefore much more should the interpretation of Truces be thus understood, the production whereof of deviating so much the more of favour, as it is sparing of humane blood. But yet that Day from whence any Truce is to commence is not to be reckoned as one of the number, because such is the force of this Preposition [from] that it serves not for Conjunction, but for separation.

But this also I may add on the by, That Truces and such like Conventions do immediately oblige both Parties confenting, as soon as they are perfected; but the Subjects on either side are not bound until the Truce receives the Form of a Law by a publick Procla-
: which done, The Subjects on either side are obliged to observe it. But yet this Proclamation being made in one place only, shall not from that instant extend its ob-
: power through all parts of that Nation. But sufficient time must be allowed, that every part may receive knowledge thereof. And in the mean time, if any thing be by those Subjects done contrary to that Truce, they are not at all punishable for it. Neither are the perfons contracting notwithstanding any thing the less bound to repair those damages. Wherefore that fact of the Spaniards in Italy, recorded by Mariana, cannot be ed. What may lawfully be done, and what not, may easily be collected from the very definition of a Truce. All hostile Acts are unlawful, whether they be done against pers-
: or things. For whatsoever is by force of Armes done against an Enemy during a Truce is contrary to the Law of Nations, as Lucius Amilius in Livy tells his Souldiers. Nay, whatsoever shall come from the Enemy accidentally into our Quarters, although it had been formerly ours, yet must it be restored; because by that external Jurifde, whereby such things ought to be tried, they are the Enemies. And therefore, as Paulus the Lay-
: oberves, the Right of Possliminy in the time of a Truce, is, as it were, out of date; becaufe unto this Right it is required that there should precede another Right, namely, A Right to take from an Enemy by force what we can; which during a Truce cannot be admitted. To go and come hither or thither, as we please, so arrayed as not to threaten danger, is lawful. This Servius notes upon the words of Virgil,

Trojans, with Latines mixt, in safety go.

Where also he relates this Story, That the City being besieged by Tarquin, and a Truce agreed upon between Porfenna and the Romans, whilest the Circean Games were celebrating within the City, the Latine Captains were permitted freely without any restraint, not only to try their Fortunes among the Romans, but, being Victors, to be crowned also.

For an Enemy to retreat back with his Army, as Livy informs us that Philip did *, is no breach of a Truce: No more is it to make up our breaches, to levy Souldiers, and the like, unless it be particularly agreed to the contrary.

But on the contrary, by corrupting a Garrison to surprize places held by them during a Truce, is utterly unlawful; for it is not possible that such places should be justly gained by but the Right of War. The like may be laid of Subjects, who during a Truce, cannot, if they would, revolt to the Enemy. An example whereof we may read in Livy *., For when the Inhabitants of Coronea and Hallaral, in favour to Monarchy, sent their Ambassadors to Macedonia to desir a Garrison, whereby the better to defend themselves against the insolent pride of the Thebans; they received this Answer from the King, That having lately made a Truce with the Romans, he could not at present answer their desire. We may indeed read in Thucydides, That Brasidas took the City Menda, revolting from the Athenians, to the Lacedemonians, in the time of a Truce; but withal he excuted himself by the like formerly done by the Athenians. And yet to pafs places altogether deferted is lawful, that is, if they be truly so, with a purpoze never to owne them again; but not if they be left only without Guards or Garrisons, whether those Guards were omitted before any Truce was made, or whether they were withdrawn upon the Truce-making only. For where the propriety is retained, another man's infraption is injuft: whereby that cavil which Belzarius urged against the Goths, is easily refuted; who in the time of a Truce feized on some places being ungar-
rifoned, upon this prentice of being forfeaken.

Here also it may be questioned, Whether he who during the Truce is forcibly detained, and that Truce being ended is found among Enemies, hath by the Law of Nations a Right to return. If we look only to that Right which is external, this mans condition is the same with his, who coming in Peace only for Traffick, the War breaking out unex-
pectedly

V. When they begin to bind.

VI. What may lawfully be done during a Truce.

VII. Whether to treat back, to repair breaches, or the like.

VIII. To surprize places of strength, unlawful.

IX. Whether he that being forcibly detained during the
Of Truces, Free-passes, &c.

BOOK III.

Truce, hath a Right afterwards to return.

* Book 3. Ch. 9.

Truce, laid it unfortunately found amongst Enemies, whose doom (as we have already declared *) is, To be kept Prisoner during the War. Neither is this repugnant to internal Justice, so far forth as the Goods and actions of Enemies stand obliged for the Debt of the City they inhabit, and may be taken in discharge thereof. Neither hath this man any more reason to complain, than many more innocent persons have, who occasionally suffer by that War. Neither are we to refer hither that Cave which Cato puts in his second Book of Invention, concerning that Ship armed with an Iron Beak, which contrary to the Rhodian Law was found driven by a violent Tempelt into Harbour, and according to that Law confiscate, and by the Queller demanded to be sold. For there the force of the Tempelt did excuse the punishment. But here we discourse not of punishment, but of a Right that for a certain time only lay, as it were, asleep. Yet without all doubt to relieve such a man were far more generous.

There are also some things that during a Truce are unlawful, not simply of themselves, but as they are repugnant to that end for which only the Truce was granted. As for example, if a Truce were granted only for the Burial of the Slain, there ought nothing to be altered; so if the Truce be made, that the Beligerant should not in such a time be affauluted, as that made by *Tetias with the Neapolitans; then to receive fresh Supplies, or to go and come freely, is unlawful. For feing that such a Truce is granted in favour to one side only, it ought not to be made use of to the detriment of the other. Sometimes it is agreed, That during the Truce it shall not be lawful to come and go at pleasure. Sometimes again safety to persons is granted, but not to things, in which Case, if any man's person shall be hurt in the defence of his Goods, nothing shall be judged done contrary to the Truce. For since it is lawful for us to defend our Goods, personal safety is here to be referred to that which is principal, and not to that which comes by consequence only.

If the Truce be broken on one side, there is no doubt but the injured Party may take Armies without any other solemn Denunciation; for every Article implies a Condition, as we have elsewhere said *. Some examples we may find in Histories where the breach of a Truce hath been convined at, even to the end of it; but we may likewise read of the War made against the *Heraclea and others, for doing things contrary to the Truce agreed on. From both which different examples we may collect, That the injured Party may lawfully take Armies. But whether he will make use of this Right or not, lies in his own choice.

But this is evident, That if the punishment agreed upon, being required, be accordingly inflicted on him that breaks the Truce, then the Party injured hath no Right to make war upon that account. For to this end is the Offender punished, That all others may be secured; so on the contrary, If the injured person shall chuse rather to make war, then is the Offender acquitted of punishment.

But yet what is done by a private person breaks not a Truce, without the access of some publick Act, that is, of command or approbation. But if he that doth it be neither punished, nor delivered, nor restitution made, it shall be reputed as done by the publick Order of the State.

A freedom to pass to and fro when no Truce is agreed on, is a kind of privilege, and will therefore admit of such an interpretation as is already declared *, where we treated of privileges. Now this privilege being neither prejudicial to any third person, nor grievous to him that granted it, is not to be underfoot in the strictest sense, but with some allowance of favour, yet so that the propriety of the words will bear it; but especially if it were freely offered and not granted at the request of him that hath it. But much more when, besides that which is private, there is any publick advantage to be gained thereby. We are therefore to forbear rigorously to interpret any such Passes, though the words may perhaps warrant it, unless otherwife some great absurdity will ensue, or that we are theretounto led by very probable conjectures, That it was so intended by him that gave them. On the contrary, A favourable construction, even beyond the proper signification of the words, shall take place, rather than any such like absurdity shall be admitted, especially if we shall be thereunto induced by any such probable conjectures.

From whence we may collect, That a safe Pafs given unto Souldiers comprehends not inferior Captains only, but even chief Commanders; because the propriety of the word will admit of such a construction. Although also it may admit of another more strict, to under the name of a Clerk may be underfoot a Bishop; as under that of Souldiers, Mariners employed in a Ship may be comprized, and all such as in that War are engaged by a Military Oath.

Leave given to come, shall be underfoot as if it were also given to return; yet not through the force of the word, but to avoid somewhat that would otherwise be aburd. For that which is intended as a courtfee, should not by any construction be rendred unproftible; wherefore it implies also a safe return, so far until we shall arrive thither, where
we may be in safety. It was therefore but treachery in Alexander to cause those persons to be killed in their journey homewards, to whom he had indulged the favour to depart. Concerning which fact Plutarch gives his census thus, Hec velut macta ad haestis lictorius regis, cetera in Bello agere & jussi & regularis fato; This was a great blinsh to the actions of a King, otherwife just and magnanimous. But on the other side, if licence be given to depart, it shall not be so understood as if it were also given to return; neither doth that which is given us to come, give us a Right to send; for these are two divers and different things: neither is there any reason why we should seek after a fence beyond that which is natural to the words; but yet an error herein committed, though it confer no right, yet certainly it mitigates somewhat of the punishment, if any such be added. But even he, to whom leave is given to come, may come once, but not again, unless the time limited in the Paifs be such as may induce us to believe otherwise.

The Son shall not be permitted to follow his Father, nor the Wife her Husband, unless it be with a purpose to cohabit with him: for it is usual to dwell, but not to travel with our Families; a Servant or two though not express, yet may be premised to be allowed to such as cannot well travel without them: for he that grants the principal, may well be thought to grant the necessary consequents, which yet is to be morally understood.

Where licence is granted to persons, Their goods are also comprehended, though haply not all, yet such as are useful for travellers to carry with them.

Under the word [Companions,] we are not to understand such whose condition is more hateful than his, to whom the licence of Safe-coming is granted, as Pyrates, Robbers, Fugitives, and Rebels, if the Nation from whence they come, be in the Paifs-port, it evidently excludes all Foreigners from protection.

Licence to pass freely, being granted by virtue of the supreme power, is not in a case that is dubious, made void by the death of him that granted it, according to what hath been already said concerning the grants of Kings and Soveraignt Princes.

It is likewise frequently questioned what is meant by this clause in a Paifs, during my pleasure; whereunto the best answer is, that this privilege shall last until some new declaration of the will of the Donor shall rescind it; in a dubious case, that which was deemed sufficient to give a Right, shall be presumed sufficient to continue it: But yet not, if he that granted it be disabiled any longer to declare his pleasure; as in case he be dead, for then whatsoever depended barely upon the uncertainty of his will, shall likewise cease, as accidents do when the subsistence fails.

A Safe-paifs being granted, protection is due even beyond the Territories of him that grants it, because it ought to protect us against all the licence of War, which of its self is not confined within the bounds of any one Princes Dominion, as we have elsewere shewed.

The redeeming of Captives is very much favoured, especially among Christifians, it being an especial act of mercy commended unto us by the Law of God. Redemptio magnam & praecipuita munus, were the words of Latianus; The redeeming of Prisoners is a great and singular part of justice. And in case it be from Barbarians, it is by St. Ambrofe reckoned as the beft and greatest liberality in the World; and in that Apology he makes for himself and his Church, for the breaking in pieces the consecrated Vessels, thereby to redeem the Captives, he affirms, that, Ora tus Sacramentorum in redemptio captivorum; The chiefest ornament of Christian Sacraments, is the redeeming of Slaves: where alfo he hath many other such excellent sayings to the fame purpose. St. Aug, following the example of St. Ambrofe did the like, though contrary to the carnal fence of some who therein opposed him, as Poffidius relates. The very fame is recorded by Hincmarus in the life of Remigius. And Adamus in his Ecclesiatical British History, makes honourable mention of the like fact done by Kimberius Archbiaph of Breme. And we likewise find it approved of by the fithc general Synod, whose decree is recited by Gratian, namely, That no Bishop shall presume to alienate any of the consecrated Vessels of their Churches, unlefs such caufes were as of old approved of by the Ancient Canons of the Church, as for the redeeming of Captives and the like.

Being thus aved by fo great Authorities, I dare not absolutely approve of thofe Laws, which forbid the Redemption of Slaves, without a diftinotion, such I mean as we may read of among the Romans, Nudi Civitatis viliones Captivos quim nobis; There is no City fo regardles of Captives as ours, faith a wife Roman in open Senate. For which cause Rome is called in Livy, Civitas Captivis minus indulgens; A City showing fmall fa vor to Captives. That Ode of Horace is very well known, where he condemns the randoming of Prisoners as an opprobrious act, an example of dangerous conquence, and is an execrable fact encouraged with a reward. But what Aristotle blames in the Laconian, is also usually blamed in the Roman Government, namely, that all their Polit}
Redemption of Captives.

BOOK III.

XXV. That a man may transfer his Right in a Captive.

XXVI. The ransom may be due to more than one.

XXVII. Whether an agreement for a ransom be null’d, his estate or quality being not then known.

XXVIII. What Goods of Captives are his that takes them.

XXIX. Whether the ransom agreed on be chargeable upon the Heirs.

XXX. Whether he that is freed to free another, ought to return, the other being dead.

tended only to the advancement of their Military Discipline, as if in this alone consisted the safety of their Commonwealth; whereas, if we will but duly consider it as rational men, with the allowance of some grains of compassion, it would seem much better to rebate somewhat of that rigour, which the licence of War permits, than to leave so many of, perhaps, our Kinimen and Countrymen in an everlasting slavery. I cannot therefore conceive how such a Law can be reputed just, unlefs it shall appear that such a severe course is necessary for the prevention of far greater, and morally inevitable calamities, which will otherwise in all humane probability fall upon us: for in such a case of necessity, as the Prisoners themselves ought by the rules of Charity, patiently to bear their hard fortune; fo may this punishment be justly imposed upon them and threatened against others, to deter them from the like cowardize, according to what we have elsewhere written concerning any one Citizen, which for the publick safety of the City may be delivered up.

True it is, that to make Slaves of such as are taken in War, is not agreeable to our Laws and Customs; yet doubtles may that Right of exacting a ransom from him that is taken, by him that took him, justly be transferred to another: For by the Law of Nature things even incorporeal may aslo be alienated.

And possible it is that the same ransom may be due to several persons; as in case a Prisoner being discharged by one, the ransom not paid, be apprehended by another, and after that by another, these mult needs be distinct debts, because they arise from distinct causes.

The ransom agreed upon, shall bind the Contractors, though the Prisoner be found richer than he was thought to be, when the Contract was made; because by that Right of Nations which is external, whereby we are in this case to be judged, no man can be compelled to give a greater price than what was first agreed on, although undervalued, if there were no fraud in the Contract, as may easily be underflood by that which hath been already delivered in the Chapter of Agreements.

From what hath been already said, that Captives are not now to be made Slaves, it follows, that the Dominion that we have over their persons, doth not give us an universal Right to all that is theirs, as hath been elsewhere said: for that he takes a Prisoner hath a Right to nothing but what he particularly lays hold on; so that if the Prisoner can conceal any thing he hath from him, he cannot be said to get it, because he is not thereof possessed. Thus Paules the Lawyer pleads against Brutus and Mannus, He that takes a Field into his possession, cannot be said to be possesses of the treasure, which he knoweth not to be there buried; for no man can be said to possess that which he knows not of: Whence it will likewise follow, that what the Prisoner can so conceal, he may make use of for his Redemption.

Another Question is like to arise, namely, whether a ransom agreed on, the Prisoner dying before it be paid, may be recovered from his Heir? Whereunto the answer is, if the Captive dye in Prison, doubtles the ransom is not due, because the promiss was made upon condition that the Prisoner should be set at liberty, but he that is dead cannot be said to be at liberty: But on the contrary, if being at liberty, he shall die, the ransom shall be recovered, because he enjoyed that for which the ransom was promised; yet I confess the Contract may be so made that the ransom shall be due simply, and immediately from the time of the Contract, and then the person taken shall not be thenceforth be held as a Prisoner of War, but as one that doth freely engage himself as a Surety for the payment thereof. So on the contrary, the Contract may be so made that the ransom shall not be due, unlefs the Prisoner live and be at liberty upon a Day prefixed; but these things being left natural, shall not be presumed to be done, unlefs evidently proved.

It may likewise be questioned, whether he that is first released on condition, that he shall release another, if that other dye before he be released, is bound to return into Captivity. I have elsewhere proved that a promiss freely made for the fact of a third, is sufficiently performed if nothing be omitted by the Promiser, in order to its accomplishment; but if a promiss be made upon a valuable consideration, the Promiser stands obliged to the full value of what he promissed. Just so it is in this case, for he that is released is not bound to return into Captivity, because it was not agreed upon; nor will that indulgence that is given to liberty, admit it so to be tacitly underflood, neither ought any man to make a gain of another mans liberty; but yet he that is so diffimt out of Prison, ought to pay the value of that which he could not perform. For this caufe was Balaminus much blamed by Marcus, who being released upon his promiss to release Carvalius, Carvalius dying before he could be released, refused to pay the value of his ransom. This answer I conceive to be more agreeable to the naked and simple truth, than that which is delivered unto us by the Interpreters of the Roman Laws.
Concerning Faith given by inferior Commanders in War:

I. Of the several kinds of Commanders.
II. How far an agreement by them made, binds the supreme power:
III. Or gives occasion to such an obligation:
IV. Whether any thing be done contrary to command: this explained by definitions:
V. Whether in such a case the contrary party be obliged:
VI. What the Commanders in War, or the Magistrates may do concerning their inferior:
VII. If it is not in the power of a General to make Peace:

Amongst publick agreements this is reckoned by Ulpian as one, when the Generals of each Army do agree about some things between themselves: We declared before that when we had sufficiently difficut of Faith given by the supreme Powers, we would likewise lay somewhat of Faith given by subordinate Powers, and that either between themselves or unto others, whether those powers were next immediately to the supreme: As that of Generals, to whose Conduct the Army is committed; whereunto we may fitly refer that of Livy, Nee Duxem novimus, nisi ejus aspiciat Bellum geritor; We acknowledge no other Captain, but him to whom the management of the whole War is committed: Or whether they are such as are Commanders under them, between whom Cesar in his Commentaries distinguishes thus, The office of a private Captain is one thing, and the office of a General is another; the former doth but execute particular orders, but this latter ought freely to consult and provide for the safety of the whole.

As concerning these men engagements, there ought to be a twofold inspection, first, Whether the supreme powers are thereby engaged; and secondly, Whether they themselves are bound by them. The former of these may be determined by what we have already said, namely, That Princes may be obliged by such as they depute to declare their wills, whether particularly express, or collected from the nature of their office; for he that grants a power, grants as much as in him is, all things necessary to that power, which in moral things is morally to be understood; whence we may collect, That subordinate Commanders may oblige their Sovereigns two several ways, first, by doing that which in all probability belongs to their place or office; secondly, by doing that which belongs not to their office, yet which they have a special Commission to do, in case that Commission be either publickly known, or at least unto those with whom they have to do.

There are also other ways whereby a Sovereign Prince may be bound by the facts of his Officers, yet so, that that fact is not the proper and immediate cause of that obligation, but the occasion only, which may be done two ways, either by confenting unto it when done, or by the thing itself. Their consent will appear by their approbation, which may be given not only expressly but tacitly; that is, when the supreme power had knowledge thereof, and yet permitted them to be done, which cannot with any probability be referred to any other cause; and how this may proceed we have elsewhere shewed. By the thing itself he may be so far obliged, as not to enrich himself by another’s loss; as if by an agreement made by his Ministers, a Prince receives any benefit, he is thereby bound to perform that part of the said agreement which concerns himself to perform; or if he refuse to do it, then he is bound to forego the benefit, which he either hath or may receive by that agreement: for this is that equity which as we have often elsewhere said, evens the scales of justice. And hitherto and no farther is that saying true, Si quid utiliter getum sit, valet; Whatsoever contrâl bringt profit, binds the Contrâlter. And therefore we cannot but condemn them of injustice, who refusing to fulfil the agreement, yet are resolved to detain that, which but by that agreement they could never have had; as the Romans did when they refuted, either to confirm the agreement made by Caesar Domitius, or to fet at liberty King Bitius, whom Domitius had first invited as his Guest, and then perfidiously taken and sent bound to Rome: which fact as Valerius Maximus testifies, Senatus nec ap- probare
IV. What if any thing be done contrary to Command.

And here also we must repeat what we have formerly delivered, namely, That a Sovereign Prince may be obliged by the fact of his General, in case he transgress not the bounds of his publick Office, though he act contrary to his private instructions; this equity was well observed by the Roman Pretor, in such actions as concerned Factories. For it is not, every Contract made with a Factor that shall be binding to him that employs him; but such only as are made concerning such Goods for which he is appointed his Factor. But in Case it be publicly proclaimed, That no man shall henceforth treat or make any Agreement with such a man, that man shall no longer be treated with as a Chief Minister: Nay, though such a Proclamation be made, yet if it appear not so to the Contractors, whatsoever shall be by him agreed on, shall bind the Prince that first employed him. Moreover, the condition of his Preposition ought to be observed; for he is willing to be treated with under such a certain condition, and by the mediation of such a person, whatsoever is agreed upon by that person, in reference to the business for which he was commissioned, ought in all equity to be observed. Whence it follows, That some Princes or People are more, and some less, bound by such Contracts as are made by their Generals, if their several Laws and Constitutions are sufficiently known. But in Case the be not well known, then must we be guided by the most likely conjectures, which always presume that to be within their power, without which they cannot well discharge the Office of a General. But yet if any such inferior Officer shall transgress his Commission, and promise more than he can perform, he himself shall be bound to the full value, unless some Law sufficiently known shall hinder it. So likewise if there shall be found any fraud in the Case, as if such a principal Commander shall pretend to have a greater power given him by his Prince than indeed he hath, he shall then be obliged to satisfy for the damage thereby sustained; yea, and if through his crime some great injury do arise to the adverse Party, he shall be bound to suffer punishments answerable to his crime. In the former Case, his Goods shall make satisfaction; and if those fail short, his service, or his Corporal Liberty: In the latter, his person, or his Goods, or both, according to the greatness of his crime. Neither will it suffice in the Case of fraud to declare before-hand, that he will not oblige himself: For as well satisfaction for the damages done, as punishment for a crime committed, are both of them due, not by a voluntary, but by a natural obligation.

Now because in all such Contracts, either the Prince or his Principal Minister, both stand obliged; therefore it follows, That the other Party is thereby obliged; for the Contract cannot be paid to haft. And by this we may discern the power that Subordinate Commanders have to oblige their Superiors.

Now let us see what power they have over their Inferiors. And surely it is not to be doubted but that a General hath a power over his Souldiers, and a Magistrate over his Citizens, as to those Acts that are usually subject to their Command; but not otherwise, without their consent. On the contrary, an Agreement made by a General or a Magistrate in such things as are merely profitable, shall wholly bind their Inferiors. For this is sufficiently warranted by their Office and Authority; yea, and in such things also as are burthensome and chargeable, so as those burthens be such only as have been usually exacted; but as to those that are extraordinary, they stand not obliged without their own consents and assent: Which things are very agreeable to what we have already from the very Law of Nature proved, concerning a stipulation made in the behalf of a third person. But these Generals will receive a clearer light in the handling of these Particulars.

It belongs not to a General to look into the Causes or confequences of a War, it being his Duty carefully to manage the War, but not to conclude it; yea, though he have the greatest power that can be given him by his Commission, yet shall it be underfoot of the conduct of the War only, Nemo crimina tuis habebus ordinandi rei Imperatoris. For neither have we any power to dispose of what only belongs to the Emperor (faith Bellarminis to the Goths.) Thus Agesilaus answered the Perseans, De Pace constittenda tua ef. pone Civitatem, It is only in the power of the Commonwealth to make Peace. And therefore the Peace which Albinus made with Jurgutina, without Order from the Senate, the Senate broke, as Sallo informs us. Thus likewise Livy, Qui ratatlapax quam non ex authoritate Senatus, non adjfis popul", Romans peregrinis! What stability can there be in that Peace which is made without any Order or Decree, either of the Senate or People of Rome? And therefore neither did the Promise made at Candia, nor that made at Numantia, bind the people of Rome, as we have elsewhere said. And thus far is that of Polibrunnus verified, If there be any thing whereunto a People may be obliged, they may be also obliged to all things; that is, to all things that concern not the Conduct of War. And this is apparent by what hath been already said about Surrenders, and about Sponfions made for the leaving or burning of Cities, and concerning the change of Government.
To grant Truces is in the power, not of a General only but, of inferior Commanders; that is, to such as they either assault or hold besieged, so far forth I mean as it shall concern themselves and their Forces. For other Commanders are not thereby obliged, as we may learn from the examples of Fabius and Marcellus, recorded by Livy.

On the other side, to dispoll of Men, Empires or Lands is not in the power of Generals; and therefore was Tigranes dispoll’d of Syria by the Senate, although it had been given him by Lucullus. Neither was it in the power of Maffinissa to release Sophonisba, whom he had taken in War; because (as Scipio pleaded) she was under the power, and at the discretion of the people of Rome. But over the rest of the spoil the General hath some kind of Right, yet not so much by virtue of his Authority as by the custom of Nations, whereof we have discourfed sufficiently before. But as to such things as are not actually polluted, they are wholly in the Generals power to forgive; because it is frequently seen, that both Men and Cities are willing to surrender themselves upon condition of their lives or their liberties, or sometimes that their Goods may be preferred; concerning which, the present state of things will not permit so much delay, as to expect the Prince or the Peoples pleasure. And by a parity of reason, the same power may be granted to an inferior Commander concerning such things as are particularly committed to his Conduct. There were some Roman Souldiers that had escap’d out of the Battel at Thrasymene, to whom Mahrabar in Hannibal’s absence had granted leave to depart, not with life only, but, laying down their Armes, unstrip’d; whom notwithstanding Hannibal detained, pretending, That Mahrabar had no power to grant such a Pass without his knowledge. Upon which fact of Hannibal Livy gives his censure thus, 

But as to the one passage, Mahrabar’s authority was questioned by the Senate for Rabirius, endeavoured to perfwade them, That Saturninus was lawfully killed by him, notwithstanding that Marius then Conful had draw’d him out of the Capitol with the promise of life. For, faith he, without a Decree of the Senate, who could give indemnity? as if the Faith given by Marius did oblige himself only. Not considering that Marius by his Commision was empowdered to use all lawful means, whereby as well the Majesty as the Empire of the Romans might be preserved. Neither can it reasonably be denied, That the Right of pardoning Offenders, if by that means the Commonwealth may be secured, must needs be comprehended under the Confular Power, which among the Romans was ever accounted the greatest; as Salutest testifies in the Wars of Catiline.

Moreover, in these Agreements made by principal Commanders, because they govern not their own, but the Affairs of the State, the strictest interpretation that the nature of the Contract will bear is to be followed, left thereby Princes be bound to grant more than hapsy they would, or their Generals damnifie themselves in the execution of their Office. So he that is accepted of upon an absolute Surrender, shall be judged to submit himself wholly to the will of the Conquerour, whether it be of the King, or of the People that maintain the War; Examples whereof we have in Gentius King of Illyrium, and Perseus King of Macedonia, of whom the former yielded himself to Antiochus, the latter to Paulus.

Wherefore, if this Clause may be added to the Contract, namely, That it shall stand good if the Prince or the People shall think fit; as of such we may read in divers Histories, divers Sponsions. It will so far provide for the Generals safety, that in Case that Agreement shall not be confirmed by the Supreme Power, he himself shall be indemnified, unless it be in that wherein he shall clearly be enriched.

And they who have engaged themselves to deliver up a Town, may disimifie their Garisons; as we read in Livy the Locrians did.

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**CHAP. XXII.** The power of inferior Commanders.

VIII. But it is to grant Truces: Liv. 24.

IX. But not to dispoll of Men, Empires or Lands.

**X.** Such Agreements are to be taken as an husband’s.

XI. How a Surrender accepted by a General is to be understood.

XII. How that caution, If the King or the people please, it is to be understood.

XIII.
BOOK III.

C H A P. XXIII.

Of Faith given in War by private Men.

I. That Faith given in War by private men binds not, confuted.
II. Faith given to Pyrates and Thieves, how far binding:
III. Minors herein not excepted:
IV. Whether an error doth excuse us.
V. The Objection drawn from publick profit, answered,
VI. Those applied to our Faith given to return into Prison,
VII. Or not to return unto such a place; Nor to bear Arms against such a Party,
VIII. Faith given not to make an escape.
IX. A Prisoner taken in War cannot yield himself to another.
X. Whether private men may be compelled by their Sovereign to perform what they have promised.
XI. What interpretation such Contracts will admit.
XII. What is to be understood concerning Life, Apparel, the coming of Aids, &c.
XIII. What is meant by returning back unto the Enemy.
XIV. In Agreements made, Not to surrender if just Aids come, how to be understood.
XV. The manner of the Execution makes no Condition.
XVI. Concerning Hostages given to perform such Agreements.

That Saying of Cicero is very well known, Etiam, si quid singuli, temporibus ad dulcis Hostis promiserint, eft in eo ipso Fides servanda; Whatever any private person, being urged by the necessity of the times, shall promise to his Enemy, even in that very thing ought he to preserve his Faith. Now whereas he faith [any private person] it is plain that it matters not whether he be a Souldier or a Citizen; for Faith ought to be kept with an Enemy by both. Strange it is then that any man, expert in the Laws, should aver, That Faith in publick Agreements ought strictly to be kept, but not in private. For if private men have Rights peculiar to themselves, which they may dispose of as they please. And if an Enemy be capable of those Rights, what shoud hinder but that these private men may for their lives or liberties engage those? Whereunto we may add, That unlefs this be granted, many Murders would daily be committed; yea, and many men kept in perpetual bondage: For neither could the lives of many men be otherwise preferred, nor their liberty procured; if no Faith privately made were to be kept with Enemies.

Yea, and not only with such as the Law of Nations accounts Enemies, but even with Pyrates and Thieves, are we to keep our private Faith no less than if it were publick; as we have elsewhere proved, with this only difference, That in Cafe any promise shall be extracted from us by an unjust fear, impreft by him to whom the promise is made, the Promisor may demand reftitution; which if refused, he may take by himself; whichby the Law of Nations we cannot do, if that fear proceed from a publick War. But in Cafe such a promise be confirmed by an Oath, it must necessarily be kept, if we would avoid the sin of perjury; which if committed against a publick Enemy, is punishable by man; but if against Pyrates or Thieves, it is connived at; yet not that it is then justifiable, but merely in detestation of their condition of life, who are to receive the benefit thereof.

Neither may we in this Cafe exempt Minors, if they be of such capacity as to understand what they promise; for the priviledges indulged unto them spring only from the Civil Law, whereas we respect only the Law of Nations.

As to those promises made through error or misbelief, we have already declared, That we have a power to retract them, when that which was erroneously believed was, as it were, the Condition of the promise; as when a man believing his own Son to be dead, adopts another to be his Heir.

But how far forth the power of private men extends in making any Contract with an Enemy, is a Question of greater difficulty. Certain it is, That no private man can alienate that which is publick. For if fo great a power be not to be given to a General, much less to private men; as is elsewhere proved. And yet what Contracts private men may make with an Enemy concerning their own private affairs, whether actions or things, may very well be doubted; because we cannot well grant thefe to our Enemies without endangering our own Party: Whence it will appear, That all such Contracts made are unlawful, as well with Citizens, in respect of that supereminent power their City hath over them, as with mercenary Souldiers, in respect of their Military Oath. But yet we must know,
know, That such Agreements being made to prevent a greater or more certain mischief, are to be reckoned rather as beneficial than destructive, even to the Publick. For always a lefer evil being compared with a greater, hath the appearance of good; according to that Saying of him in Apian, 'Of evils the lesser is most eligible.' And yet neither can that bare Faith whereby a man doth not utterly renounce all power that he hath over himself, and all that he hath; nor can the publick benefit, without the Authority of a Law, be of that efficacy as to make void that which is done, so as it shall have no effects of a just Right, though we should grant, That that which was promised was contrary to his Duty that promised it. The Law indeed may take away this power from its Subjects, whether they be Natives or Sojourners; but it doth not always do so, for it spares Citizens. Neither indeed can it always do it; for humane Laws (as we have already said) do then bind when made after an humane way: but do lose their binding power when they impose such things as are either altogether unreasonable, or unnatural. For those Laws or particular Mandates which do manifestly enjoin such things, are not to be either held or obeyed as Laws. For all general Laws are to be confined with so much favour to humanity, as not to bind in Caffes of extremity. But if that act which by any Law or Precept was prohibited, and though done, declared to be void, might with equal Right be so prohibited; then shall that act of a private perfon be altogether void, yet may that man be justly punished, because he promised that which he had no Right to perform, especially if being bound by Oath he shall do it.

A promise made by a Prifoner to return into Prifon is defervedly binding, because it renders not his Condition worse than it was: and that fact of Regulus was not only glorious, but just: for as Cæcero well observes, Regulus ought not by his perjury to interrupt that general Traffick, and Commerce of War, or to break those mutual Covenants and Conventions made between Enemies; yea although, as Horace speaks,

———He could not chuse but know
The tortures threatened by his Barb'rous Foe.

For even when he did engage himself by promise to return, he was not ignorant what they might do. So of those ten Captives sent to Rome, eight of them denied, That they had any Right to recover their Estates by Postliminy, being bound by Oath to return back; as we may read in Cælius.

Some Prifoners are fet at liberty upon their promise, That they will not return to such a place, or that they will never more bear Armes against them, under whose power they then are: An example of the former we may find in Thucydides, where the Ithomones engaged themselves to the Lacedemonians to depart out of Peloponnesus, and never to return thither again. And of the latter, Examples are now very frequent; an ancient Example whereof is left us by Polybius, where we find that the Numidians were diffimul by Amilcar, upon Condition, That none of them should ever engage in War against the Carthaginians. The like Condition we find imposed on the Heruleans in Procopius; yet there are that hold such an Agreement to be void, as being contrary to the Duty we owe unto our Country. But to this I anfwier, as before, That not every thing that we do contrary to our Duty is presently void. Besides, it is not against our Duty to procure our own liberty by such a promise; because, being already under the power of the Enemy until we are diffimul, we are as ufeles to off Country as if we were dead: wherefore our Countries condition cannot be made worse by such a promise.

Some there are that engage themselves not to make their escape; and herein also Faith is to be kept, though when we made that promise we were under restraint; though some there are that hold otherwise. For by this very promise either our lives are somet ime preferred; or we enjoy the more liberty. But yet if after this promise made, we are still kept under a clofer restraint, we are thereby discharged of our promise, if it were made upon Condition that we should not be fo bound.

It is but a foolish Question that some make, Whether he that is taken Prifoner by one, may yield himself Prifoner to another. For it is too clear, That no man can take away that Right which another man hath gained by any Contract that he can make: For by the very Right of War, or partly by the Right of War, and partly by the Grant of him that maintains the War, according to what we have already said, A Prifoner taken in War is his that takes him.

As concerning the effects of such Agreements there is a notable Question, namely, Whether private men, in Cafe they neglect to perform what they have promised, may be compelled thereunto by their superior Power? Whereunto the bell Anfwier is, That they may, but in a solemn War only; because they that make War, are bound by the Law of Nations each to other to do that which is right and just, even concerning the facts of private men; as if an Ambaffadour being publickly sent from an Enemy, should by a private perfon
be assailed. Wherefore, that motion which Cornelius Nepos made, was assented unto by many of the Roman Senators, as Gellius testifieth, namely, That those two of the ten Captives, who being bound by Oath to make their returns, refused, should by a strong Guard be conducted, and delivered up to Hannibal, especially considering that the same Senate had, nor long before, compelled those to return whom King Pyrrhus had dismissed upon the like Conditions.

Concerning the interpretation of some words in such an Agreement, we are to be guided by those Rules which we have often recited, that is to say, We ought not to recede from the proper signification of the words, unless it be to avoid some absurdity that would from thence follow; or that we be induced thereunto by some other very strong conjectures; and where the words are ambiguous, that we incline to that sense that makes most against him who gives the Law.

As he that covenants for his life only, hath no Right to his liberty; under the name Apparel we are not to comprehend Armes: Aids are then said to come when they are in sight, though they do nothing; for their appearance hath some kind of efficacy.

But he cannot be said to return to the Enemy, who returning privately, presently departs: For our promise to return is not fulfilled, until we have put our selves under the same power of the Enemy as we were when we promised to return. The contrary interpretation Cicerro accounts to be merely delusive, and foolishly crafty, introducing fraud, and sometimes perjury. And Gellius calls it a fraudulent Cheat, always branded by the Senators with reproach, and the persons that made use thereof rendered intolerable.

In Agreements made, Not to surrender in case just succours should come within such a time to their relief, such succours are to be understood as are sufficient to repel the Enemy, and secure us from farther danger; four Examples whereof are recorded by Procopius.

This also deserves to be observed, That if any thing shall be agreed on concerning the manner of the execution, that shall be annexed unto the Agreement as a Condition. As for example, In Case a Safe-Conduct be granted to such a place, and that place before we can arrive thither, happen to be in the possession of the Enemy, the Agreement is not fulfilled until we come where we may be in safety.

As to Hostages, we are to be guided as above said; sometimes they are but Sureties for the acts of their Principal; but yet it may be so agreed that the Obligation should be disjunctively understood, that is to say, That either such a thing shall be done, or the Hostages may be detained. But if the meaning be doubtful, we must incline unto that which is most natural, which is, That they shall be held as Sureties only, until such things shall be performed.
C H A P. XXIV.

Of Faith tacitly given.

I. How Faith may be given by silence.

II. An example in one defiring to be received into protection by any Prince or People.

III. In another that either demands or admits of a party or treaty.

IV. That it is lawful for either party during a treaty to promote his own interest; so that he hurt not him with whom he treateth.

V. Of dumb signs which by custom become significant.

VI. Of a silent approbation of something demanded.

VII. A punishment when it may be presumed to be remitted by silence.

T H A T some things are by silence agreed on was not ill observed by Javolemus; for this is usual in most agreements, whether they be publick, private or mixt; the reason whereof is, because it is our custom only however signifyed and accepted that hath the power to transfer our Right. But this content of ours may be otherwise express than by voices or letters, as we have already shewed: for some signs are naturally included in the act it self.

As for example, He that coming from an Enemy, or as a Stranger, commits himself to the Faith of another King or People, doth without doubt tacitly oblige himself, not to act any thing against that State under which he desir'd protection; we cannot then agree with them, who julifiteth act of Zopyrus, who not being able to conquer Babylon by force, cut off his own Nefe, Ears, and Lips, and so mangled, fled into the City, and perfwaded the Citizens that Darius his Master had done it in revenge for speaking somewhat in their behalf; and having thereby got into some place of eminent trust, betrayed the City unto Darius: For Zopyrus his fidelity unto his Prince, could not jufifie his perfidious dealings with them to whom he fled, and by whom he was received into protection. The like may be said of Sextus the Son of Tarquin, who betook himself for safety to the Gabii. Virgils confure upon the like fact of Sion was this,

Now Grecian Treacheries view, and from this one,
Learn to avoid the rest.

So he that demands or admits of a Party, gives his Faith tacitly, that during that Party both Parties may be secure. * Agathias condemneth Ragnarius the Hun, for attempting to kill Nofetes in his return from a Conference whereunto he had invited him. This Liev concludes to be a manifest breach of the Law of Nations, when Emetics under the colour of a Treaty, shall lay wait to destroy each other, which he there fifies, Colloquium perfide violentum; A treaty most perfidiously broken. Upon that fact of Chres Domitius before-mentioned in treacherously fizing upon King Bithynus, whom he had first invited to a Party, and afterwards entertained as his Gueft, Valerius Maximus gives this confure: Nimiis gloria cupiditas perfidam exiffere corrigi; His immediate theft after glory confrain him to be perfidious. Wherefore I cannot but admire why he that wrote the eighth Book of Cefars Gallick Wars, rehaerising the like fact of T. Laebius, adds these words, Infidelitatem Comiii fine alla perfida judicavit comprimere posse; He conceived that Comius his disloyalty might be thus suppress without any imputation of Treachery.

Neither may we wrest this tacite content beyond what I have said; for if carrying themselves inoffenfively one towards another during the conference, they can under the colour of that conference divert their Enemies from their Warlike Counsels, and in the mean time strengthen themselves and promote their own affairs, this shall not be accounted treachery but policy, such as in times of War are not lawful only but commendable: wherefore they that blamed King Perseus for suffering himself to be deluced through hopes of Peace, had not so great a regard to justice and fidelity, as to the generosity of a mind emulous of Martial Glory, as may be sufficiently collected from what hath been already said concerning the deceits and stratagems usual in War. Such was that stratagem wherewith Aftrobal preferved himself and his Army out of the Auffiane Forests. And that also whereby Scipio Africanus the Elder, difcovered the situation of Syphax his Camp, both which we find recorded by Livy, whose example

D d d d
Of Faith tacitely given.  

BOOK III.

V.

Of dumb Signs which by custom are significant, as testifying the content of the will; as of old the branches of Olives, and among the Macedonians the erection of Pikes; among the Romans the covering of their heads with their Shields, these were then the usual signs of submission and rendition: So also was the folding of the hands behind them among the Persians; and the turning of their Shields and Ensigns downwards among the Romans, as Ammianus testifies. The Germans, and from them some other Nations, express their submission by the holding forth of Herbs or Grasfs, as Pliny tells us. And they that yield themselves to the Conqueror, do usually cast away their Arms, and beg mercy, as Servius notes upon Virgil. But he that would signify his acception of a surrender, whether he be bound to give quarter, and how far forth, we may inform our selves by what hath been said above. In our days the hanging forth of a white Flag is a tacit sign that a Treaty is demanded: So among the Northern Nations is the kindling of a fire, as Johannes Magnus relates. The like doth Pliny write of the Laurel, all which according to the customs of several Nations, are no les significant, and consequently as obligatory, as if they were express by words and voices.

VI.

Of a tacit approbation of something demanded.

* Bo. 3. ch. 4.
S. 15. & Bo. 2.ch. 15.§ 17.

VII.

Punishments when tacitly remitted

VIII.

Whether the actors being pardoned, the instigators be also acquitted.

example L. Sulla also followed in the Social War at Eufenia, as Frontinus informs us.

There are also some dumb signs, which through custom are significant, as testifying the content of the will; as of old the branches of Olives, and among the Macedonians the erection of Pikes; among the Romans the covering of their heads with their Shields, these were then the usual signs of submission and rendition: So also was the folding of the hands behind them among the Persians; and the turning of their Shields and Ensigns downwards among the Romans, as Ammianus testifies. The Germans, and from them some other Nations, express their submission by the holding forth of Herbs or Grasfs, as Pliny tells us. And they that yield themselves to the Conqueror, do usually cast away their Arms, and beg mercy, as Servius notes upon Virgil. But he that would signify his acception of a surrender, whether he be bound to give quarter, and how far forth, we may inform our selves by what hath been said above. In our days the hanging forth of a white Flag is a tacit sign that a Treaty is demanded: So among the Northern Nations is the kindling of a fire, as Johannes Magnus relates. The like doth Pliny write of the Laurel, all which according to the customs of several Nations, are no les significant, and consequently as obligatory, as if they were express by words and voices.

A Sponfion made by a General, how far forth it may be believed to be tacitly approved of by the Prince or People, we have already declared; as namely when both the act is sufficiently known, and thereupon some thing done or not done, whereas no other reafon can be given, but what proceeded from their content to that promise or agreement.

We cannot conclude that a punishment is remitted, because it is for a time disfemtibled or connived at; but some other act must necessarily intervene, which either by itself may argue, either a perfect reconciliation, as when a League of friendship is made with such a man; or at least that the person offended hath so great an opinion of the vertue or the valour of the person punishable, that what he formerly did, deferves to be pardoned, whether this opinion be by words expressed, or by such other means as are usually taken to signify as much.

Another Question we find difficult by Pelybius, namely, Whether a punishment being remitted to them that did the mischief, may be judged to be remitted to them that commanded it to be done; which I conceive it ought not, for, Singulars remet fun delitia; Every Fox ought to pay his own skin to the fleer, and every offender bear his own punishment.
The Conclusion, with certain admonitions to preserve Faith and Peace.

I. An exhortation to Princes to keep their Faith.
II. The end of War is to settle a firm Peace.
III. That Peace is to be embraced, though with loss, especially by Christians.
IV. That to make Peace is profitable to the Vanquished.
V. And no less to the Conquerors.
VI. And to those also whose condition is doubtful.
VII. That Peace being once made, ought religiously to be kept.
VIII. The Authors with, and the Conclusion of this Treatise.

And here I conceive I may make an end, not that I have said all that might have been said; but that what hath been here said, may suffice for a foundation, whereupon if any other will build more speciously, I am so far from envying him, that I shall heartily thank him. Yet before I dismiss my Reader, as before when I began to discourse of War, I gave some arguments to persuade all men (so far as in them lay) to prevent it; so here, I shall only add some few motives to excite Princes, both in and after the War, to keep their Faith and maintain Peace; but especially to preserve their Faith, as for many other reasons, so especially for this, left being observed to be faithless, there remain no hopes at all of Peace. For it is by Faith, faith Othere, that not Commonweaths only, but that Grand society of Nations is maintained. Take away this, faith Aristocrates, and all Humane Commerce fails. It is therefore an execrable thing to break Faith, upon which so many lives depend. It is, faith Seneca, Sanctissimum humani peccatis bonum; The best ornament wherein God hath beamishd the rational soul: which ought so much the more inviolably to be kept by Sovereign Princes, by how much they may sin with greater licence and impunty than other men: Wherefore take away Faith, and men are more fierce and cruel than Savage Beasts, whose rage all men do horribly dread. Justice indeed in all other of her parts hath some thing that is obscure: But that whereunto we engage our Faith, is of it self clear and evident; yea, and to this very end do men pawn their Faith, that in their Negotiations one with another, all doubts may be taken away, and every scruple removed. How much more then doth it concern Kings to keep their Faith inviolable, as well for Conscience sake, as in regard to their Honour and Reputation, wherein conflits the Authority and Power of a Kingdom. Wherefore let all Princes know, that they that endeavour to inflit into them such fallacious Principles, do themselves practishe what they would teach others: And that it is impossible that those practices should always prosper, which render men unfacible with men, and detestable to God himself.

Moreover it is not possible, that any Soul shoulde (throughout the whole course of the War) reft secure, and contain it self within its Duty toward God, that doth not always aim at Peace. It was very truly said of Saloie, Sapientes pacis cælo Béllam gerunt; That wise men in making War, aim at Peace. Wherewith agrees that of St. Aug. We seek not Peace, that we may make War; but we make War, to establish Peace. Nay, Aristocrates himself often condemns those Nations that make War their trade of life, and propose it to themselves not as their refuge, but as their choice: for, Ferendum quidam visisse; Force in is self is brusht, yet is it the very Soul of War: it ought therefore to be the more carefully carried on, and attempted with Clemency and Humanity, Ne nimium feris imitande, sedciamus hominem; Left, like Nebucadnusor, by living too long like Beasts, we at length forget our selves to be men. It was an excellent Speech that Justinian Embassadors made to Cofree, recorded by Procopius, War is not that they, that we are in thy presence, O King, we could not have believed that Cofree the Son of Cabada would have entered into the Roman Territories with an Army, not only in contempt of the Oath be hath taken, which is the strongest pledge of truth and faithfulness that can be given amongst men; but contrary to the League made between us, which was the only hope of those, who by reason of the outrages committed in War, could not otherwise live in safety: what else can be said of this, but that the lives of men are hereby changed into the lives of wild Beasts. For take away the force and power of Oaths and Leagues, and it will necessarily follow, that men must eternally make War one upon another: and the consequence of endless War it, That it holds men perpetually as if banished from their own Nature.

D d d 2. A safe
A safe and honourable Peace is not too dearly bought, if it may be had by forgiving, as well the Offenders as the charges and damages of the War; especially by us Christians, to whom our great Lord and Master hath bequeathed Peace as his last Legacy: whose best Expositor St. Paul* would have us, if possible, and as far as in us lies, to live peaceably with all men. A good man, faith Salufts, will not enter into a War unless enforced, nor willingly profecute it to the utmost, although he be provoked. Is it not a shame for men the mildest of all Creatures, to delight in shedding each others blood, and to make War and bequeath it to their Children, when they fee dumb Beasts to live quietly and peaceably together?

It is enough, if we can obtain Peace, though with losses; but for the most part the common interest of all Parties invites, may draws us to this Point: As first, That Party that is weakest. For to cope long with an Enemy stronger than our selves, must needs be dangerous: wherefore, as in a violent Storm, we eftimate it a good purchase if we can redeem our lives with the loss of our Goods; so being over-powered by an Enemy, it will be no ill Bargain, if with the loss of some part we can secure the whole, leaving those vain Arguments drawn from hope and revenge to their deluding Authors. Which Aristoteles delivers thus, Much better is it for them that think themselves strongest, to forgo something of their Right, than to hazard all (together with their lives) to an uncertain Victory; Wherefore Philo, in his Institutions of a virtuous Prince, tells him, That Pax quam vultum maximum detrimento est Bello utilior: Peace, though with some very great damage, is far more profitable than War.

Yea, and to that Party that is most powerful, is Peace most profitable; because they enjoy Peace, with plenty and prosperity, which is much better and more lasting than an hoped for Victory. For we must remember, That the success of War is uncertain, and many changes and chances do frequently happen which cannot be foreseen. Diodorus, in an Oration he makes for Peace, blames them that boast of their great exploits done in War; as if it were not usual for Fortune sometimes to favour one side, and sometimes another. And the bold attempts of desperate Men are more to be feared than the sharp Teeth of dying Beasts.

But what if both Parties seem to be of equal strength? Then (if Cesar may be believed) is the fittest time to treat of Peace, whilst each Party is confident of his own power.

But Peace being once made, whatever the Articles are, they ought strictly to be observed, to preserve our Faith. For very careful we ought to be, not only to avoid perfidious enemies, but whatsoever else may provoke or exasperate the adverse Party. For what Ciceron sometimes said of private friendship, may very fitly be applied to publick. If all friendships are to be faithfully and religiously preserved, surely these most especially, that from an open hostility are reintegrated and made new again by making Peace.

God, who alone can do it, instil these things into the hearts of those who manage the Affairs of Christendom, giving them a mind thoroughly instructed in all Rights both Divine and humane, and always remembering that She is chosen by God as his Vicegerent on the Earth to govern Men, the best and (as Ciceron notes) the most beloved of all his Creatures.

All Glory be given unto God alone.
His Charge to his Son.

If any Controversie or Suit arise against thee, search into the truth whether it be for thee or against thee. And if thou possessest any thing that is thy Neighbours, which either thou or thine Anceflors have unjustly gotten, restore it presently. Beware how thou makeft War against any of thy Christian Neighbours, without the advice of many, and unless preft thereunto by unavoidable necessity. In thy Wars spare the Priests, and such as are inoffenfive. If War or Suits arise among thy Subjects, appeafe it and reconcile them with all speed possible. Have a watchful eye over thy Bayliffs, Governours, and other Officers, and enquire stricfly into their acts, that what is amifs may be speedily amended, and see that no crying sin raing within thy Kingdom.
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